

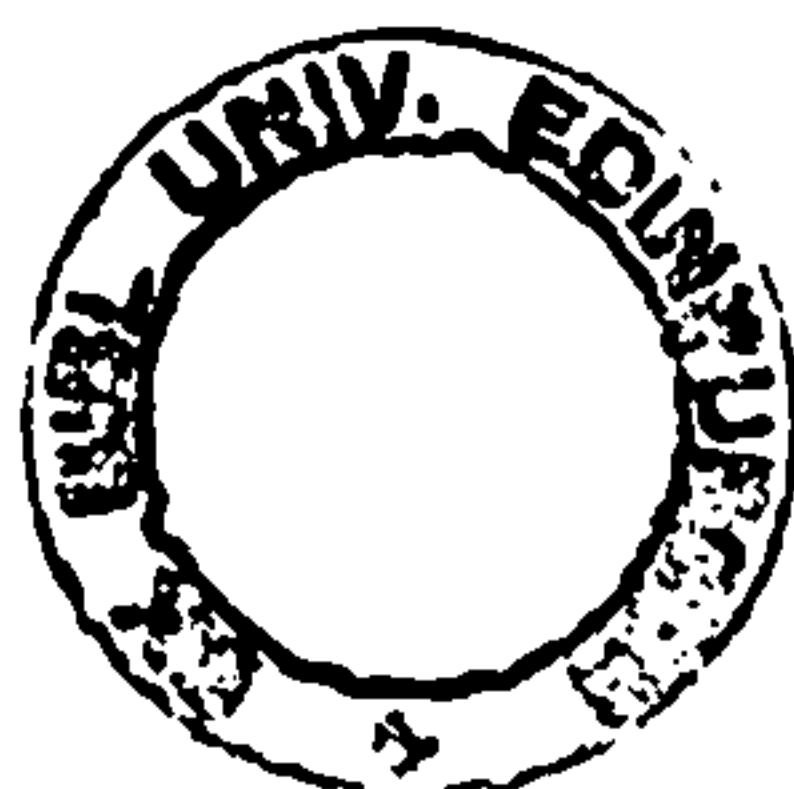
The Language of Equality:

An Investigation of the Social Connections of
Modern Legality

by

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DECLARATION

I declare that this thesis is based on my own research and has not been accepted for a higher degree at any other University.

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ABSTRACT

The Language of Equality is contained in three parts.

The first part is an elaboration upon the theory of modern legality as largely understood in the view of E.B.Pashukanis.

In this connection legality appears, firstly, as an antithesis between individuality (as many different individuals) and (their) equality in law. This antithesis appears as the most basic category of modern legality, namely, the equal or abstract individual, or, more concretely, the "persona" of private law. Secondly, this element itself appears in antithesis with the state, which cannot be considered as simply another co-equal legal individual. This latter opposition comes forward, for instance, in the traditional dualism of law and state, and of private and "public" law. The material elements behind these antitheses are considered as subsisting, respectively, in the generalised form of private commodity-ownership and, in the second case, as subsisting in the opposition of private and social interests.

The second part is a development of this form of legality as expressed in modern-classical thought (primarily Rousseau and Kant). Here the emergent language of equality coincides with the historical emergence of generalised commodity relations, and certain lessons that are to be learned from this process are considered in detail.

The third part is a criticism of Historical Jurisprudence and Legal Sociology in the views that are here expressed of modern legality, Roman law, feudal law and Natural Law; criticism, for example, of Gierke, Maine, Ehrlich, and Weber.

Introduction

The principal concern of this work is with the form of modern legality, and as with all other subject-matters that are constituted in their essential nature through man's social activity, it is a process which has been thoroughly steeped in the manifold of idealistic sentiment. This is perhaps more so in the case of law than anything else and its treatment from a properly scientific standpoint, despite innumerable appearances to the contrary, is therefore a rare event. Such is the state of affairs that I can name, without hesitation, only one solitary figure of recent times who has actually lived up to this requirement: E.B. Pashukanis, who, taking Marx's theory of commodity relations as a point of departure, established the investigation of modern legality upon a scientific footing hitherto unparalleled - and since unimproved. The theoretical material of the present work is cut here.

The question of legality, or right,¹ has always

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1. The term "right", used here and elsewhere is used in what has become recognised as the "German" sense, namely, the sense which denotes the principle of rights in concreto, which conveys the principle of law as distinct from the immediate or sensuous empirical manifold in which it comes dressed. "It is the merit of the German term 'Recht' that it maintains the connection between law and the spirit of law.." - Bosanquet, The Philosophical Theory of the State, p.240.

appeared inextricably bound up with idealism of one kind or another. With astonishing tenacity such things as justice, morality, nature, will and so forth have again and again been confounded with the specifically legal form, even in the most profound reflections thereupon, indeed, especially the "most profound" - I mean here those characteristic of modern-classical thought, from Grotius to Kant - which, with an apparent immunity from the passage of time, have at all events done a remarkably good job of keeping the form of legality sealed off from a more down-to-earth scrutiny. This has remained the case, moreover, notwithstanding the increasing frequency, since the early nineteenth century, of "more realistic" appraisals of law. The positivistic stance in relation to legal subject-matters, for instance, has not established its spokesmen in any significant position beyond the theoretical boundaries set by modern-classical idealism, and even those who have recognised this and explicitly made the return to modern-classical ideas of right have generally failed to acknowledge that these ideas had already begun their eclipse in Adam Smith's day (and in Smith's work). So given this state of affairs, the

criticism of the modern-classical ideas of right still retains a high significance today in the criticism of modern legal culture generally.

There is nothing entirely tongue-in-cheek, then, in stating that modern-classical idealism presents us with some of the finest and "most profound" examples of reflection upon the form of modern legality, even in the face of the almost mystical conundrums which it produced in this regard. Here is an example:

Rights are not based on powers: because of the moral nature of justice, they are based on the fact that in each man the same will to live appears at the same stage of its objectivisation.

This statement is pure metaphysical hocus-pocus. But it is not merely this. Just as Freud showed how the most fantastic dream conceals within itself the sublimated elements of very real repressed anxieties, so here it becomes possible to show how the dream-like content of Schopenhauer's statement hides certain very important objective elements of the form of modern legality.

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1. Schopenhauer, Essays etc., p.148, - who, strictly speaking, is an eighteenth-century idealist of the nineteenth.

"Rights are not based on powers..." What this statement like so many similar ones really expresses is the truth that modern rights, in principle, consist in a generalised form of equality; they are the same for all and therefore the principle of a right becomes opposed to the relation of power. An equally crucial point, however, is that this is only true of modern, that is to say, bourgeois society. Rights are opposed to power only when they are held equally by all, when in principle, so far as rights and rights alone are concerned, no one person can appear in a superordinate position in relation to any other person. Only in bourgeois society is this the case, and therefore only here does it appear that "rights are not based on powers". Here rights are equal rights, which is the case in no other previous society. And, as a generalised form of equality, the legal form appears in opposition to the formal logic of power relationships, which are always at all events the embodiment of inequality, of super- and subordination, and hitherto manifest as such, in pre-capitalist societies, in unequal legal rights.

Still, the generalised form of equality which becomes the principle of modern rights has nothing to do with "the fact that in each man the same will to live appears at the same stage of its objectivisation." If we may continue with the dream-analogy, this "fact" is like the kind of fact which appears in the dream-thought: it does not really happen, yet neither is it unconnected with reality. The real basis of rights, as involving "each man...at the same stage," as involving, in other words, a generalised form of equality, is bourgeois society. Only here is "each man...at the same stage" from the legal standpoint, i.e. as a matter of right. In previous societies there is no such thing as "each man ... at the same stage" in this connection; hence, there is no such thing as "man" as a legal subject, only freemen, slaves, knights, vassals, serfs, guildmasters, landed nobility etc..

Essentially, the problem of right in modern-classical thought was not wrongly posed: How do the mass of individuals, who are all by nature different, become equalised under the form of a right? What is this equal standard which brings

with it the abstraction of "man"? Where it went adrift was in the answers it gave: by reason of nature "man" has equal rights (Rousseau, for example), or at least, by nature of reason (Kant). What was generally overlooked in these solutions were the conditions under which "man" found himself with equal rights. For, nature and reason in modern-classical thought were universal, and if "man" had equal rights under such auspices, then he had had them since the time of Prometheus, or at any rate since the time when he emerged from the forests and began to live in a civilised kind of way (which is what Rousseau had to conclude). "Man", however, had equal rights neither in civilised antiquity nor in the Middle Ages. Only in bourgeois society had this result come about, namely, the abstract legal subject, and as Marx often pointed out, the conditions of this lay neither in nature nor reason, but rather in the emerging configuration of social relations dominated by the form of commodity-ownership in which "man" appears predominantly as the bearer of property in exchange. The generalised form of commodity-ownership, i.e. ownership of property in its exchange form, its equivalent form, is the real basis of modern legality.

Nevertheless, returning to our little piece of Schopenhauerian mysticism (which comes, incidentally, directly from Kant as does the theoretical part of Schopenhauer's philosophy as a whole), we find that it is highly instructive. For, concealed here are the essential material elements of the modern form of legality. Firstly, that it consists in a generalised form of equality ("each man...at the same stage"), and secondly that, as such, it becomes opposed to the relations of power ("not based on powers"). These two theses, or rather antitheses (since they both contain a unity of opposing elements), contain the key to the scientific investigation of the process of modern legality.

As we have already intimated, modern post-classical legal thought has never really criticised the idealist formulations of right; it has observed their "obviously" impossible character without feeling the need to state any real reasons in this regard and has, consequently, fallen foul of the same fundamental error of conflating the generalised form of rights with rights in general, of conflating the specifically modern form of law with the form of

law in all historical periods. The same is true, in particular, of legal sociology, which frequently observes correctly the connection between the generalised form of rights and the generalised form of commodity-relations, but then proceeds to conflate this latter with commodity-relations in general, i.e. in all historical periods, and as a result of this equally impossible notions become commonplace, e.g. the "reception" of Roman law, the "secularisation" of natural law, the "substitution" of status by contract - all of which in different ways and with varying degrees of obscurity suppose the existence of bourgeois society in pre-bourgeois social formations.

Only in bourgeois society does the form of legality coincide with a form of equality encompassing the great majority of people. Only here, therefore, does the form of legality come up against the principle of organised state power, i.e. the domination of one particular "will" over all others, since only here is it an essential principle of law that no one particular class of right-holders have any privilege-distinction over any other such class. The form of modern legality is therefore characterised specifically by these problems: Firstly, the problem of generalised equality - how do the great mass of

people become abstracted and equalised under the form of a right? Secondly, the problem of power - how does this fundamentally equivalent form accomodate, and become accomodated under, the power relationships of the state? These are the connections in which the form of modern legality are to be comprehended, namely, the connections which are peculiar to bourgeois society. It is only here that its basis is to be revealed, in other words, neither in nature nor in reason, neither in the Middle Ages nor even in Rome.

Since each of the parts of this work naturally bear their own introduction of the subject-matter, it would be superfluous to go into any further detail with the issues glanced upon here. But from the few remarks that have been made, it will be apparent that the aims of this work are those recapitulated in the following three divisions:

Firstly, the investigation of the conditions in which the form of modern legality appears as an abstraction and equalisation of a large mass of different individuals. Materially, this is the investigation of the connections between the legal

equivalent form of "persons" and the structure of generalised private ownership of property in exchange (commodities). From this follows an inquiry into the conditions of the antithesis which develops out of this, namely, the opposition as between the legal equivalent form and state power, or, in other words, the opposition of generalised private interests (reflected in the legal form) and social interests (whence the character of the state's activity as a guarantor of social production vis a vis private interests).

Secondly, and in a somewhat different style, to look in some detail at the modern-classical connections of the form of legality (as has been more-than-hinted in these introductory remarks). Quite deserving of the term "classical", we have here a still-admirable yet still-powerful representative language of equality. From the most material end of the legal spectrum in part one, we come here in part two to the more "spiritual" end, as it were, and look at some of the issues surrounding the "high-points", or points-of-no-return, of modern legal culture. Here, I believe, the project turns into an aesthetic exercise, quite distinct from the scientific character of part 1. But I shall leave

the reader himself to judge the form of the connection between parts 1 and 11.

Thirdly, to observe some of the more historically-inclined views of the connections of modern legality with such things as Natural Law, Roman Law, "rationality", the "Market" economy, "contract" and so forth. Here, in Historical Jurisprudence and Legal Sociology, these connections are derived under erroneous conditions, i.e. under the form of modern legality itself. Thus we observe what is, in general, the error of historicism, which in this case resembles the reproduction of the modern-classical error of conflating the generality of the modern legal form (in bourgeois society alone) with the form of legality in general. In the case of Historical Jurisprudence the isolated abstract legal subject, the specifically bourgeois legal form (bourgeois because abstract, undifferentiated, because "persona" and not freeman, slave, vassal etc.), this historically particular form, is taken back to antiquity; in Legal Sociology, the "free" contract comprising this same abstract legal persona, is observed in Rome and the Middle Ages, and Roman law becomes "received" as bourgeois law, "status" law "becomes" contract. But this is not the place to go into these issues.

Indeed, nothing further needs to be said here except that it is time to begin.

Part I

Ch. 1. Right and Equality: Some Preliminary
Remarks.

Right and Equality: Some Preliminary Remarks

1. Despite the fact that legal right always inhabits the area of state authority and thus appears in connection with relations of super- and subordination, it is only fitting to suppose that legal thought has not been entirely in error over the past two hundred and more years and that right of this kind subsists, first and foremost, as a relation of equality. But equality amongst whom? And, why, if this principle is true, should it appear primarily in connection with legal thought merely "over the past two hundred and more years"? The two questions are not unconnected, because it is, in fact, only in bourgeois society that the idea of right coincides with the principle of equality and this, in turn, arises on account of the fact that it is only here that the mass of people become included under the same categories of legal right, and therefore as equals. Accordingly, the form of right is not merely a form which expresses equality, but a form which expresses equality which is of a particular social nature.

It is true that the notion of right in general implies an equivalent form.¹ But this doesn't tell

1. "Right by its very nature can consist only in the application of an equal standard".-- Marx, M.E.S.W. (1 Vol.), p. 320.

us a great deal about its actual nature, which is not at all to be considered "in general" but only "in particular". The fact that right in general consists in a form of equality merely provides us with the meagre information that, for instance, the right of Roman citizenship supposes a form of equality amongst all those who are Roman citizens and, by the same token, that the right of the slave (there are examples: thus, in the later Roman empire, the right to be treated without cruelty) entailed a form of equality amongst slaves, or, similarly, that the rights of the feudal serf meant equality with other serfs sharing like conditions of land tenure, and so on and so forth. In other words, there is a great deal which is left wanting in the identity of right and equality when it is considered only in general. If right is always conceivable as a relation of equality, that is fair enough, but what really needs to be known is who shares this equivalent form and upon what basis.

Clearly the equivalent form of right in general leads hardly anywhere. In the examples given above, the equivalent form of right has the significance of mere tautology: Roman citizen equals Roman citizen, slave equals slave, serf equals serf, and so on. But the equivalent form of right in particular, i.e. in bourgeois society, is of tremendous importance, for

here we get the relation, person equals person. In other words, the category of right no longer requires any differentia in respect of a particular social class. Consequently, we get the interesting riddle that the equivalent form of right in particular, in specifically bourgeois society, can be defined as the form of right in general.

However, the definition of bourgeois law as law in general depends upon a fundamental sleight-of-hand trick. Let us give an illustration of how convincing this can be:

The form of bourgeois law is universal. It is neither distinguished from other forms of law by the fact that it embodies equal rights, nor even by the fact that it embodies equal rights for all. A moment's reflection makes this clear. The form of right in general, i.e. regardless of the specific society, is equality. Right therefore means, in general, equal right. Thus, equal rights for all means, simply, rights for all - a condition which is conceivable even in a society based upon slavery.

The supposition that this kind of argument is correct underpins the whole of modern legal thought. But let us see what is wrong with it. The proposition that the form of right in general, regardless of any particular society, consists in a form of equality, is correct. However, the second proposition, that

right therefore means, in general, equal right, is a non sequitur. If right in general is an equivalent form, we can use either of the terms to denote the same thing, that is to say, we can use either "right" or "equivalent form". But if we say "equal right", we are not doing this; we are, in fact, saying "equal equivalent form". This "equal" of the "equal equivalent form" thus becomes an entirely unaccounted for addition which creeps in without our notice. What it, in fact, stands for is the generalised character of right or, what is the same thing, the generalised character of the equivalent form - which is the precise differentia of bourgeois law.

The important distinctions to be borne in mind are therefore these: Right in general is an equivalent form. But equal right is not right in general. The equivalent form is only equal, that is to say, right is only generalised and shared in common by the mass of people, without distinction, as a condition of specifically bourgeois society.

The foregoing example illustrates logically what has been the persistent error in modern legal thought. It is the error of turning the form of bourgeois law into the form of law in general by confounding one very definite and specific principle of equality with one which is not.

In pre-bourgeois societies, in feudal society for instance, the form of law is heterogeneous. For what it is worth, it may still be made to conform with the form of law in general in that a given right may be said to reflect an equivalent form; but this is only true in regard of the members of a given one of each of the many separate classes of right-holders. Feudal law is, in fact, a manifold of different equivalent forms, or, what is the same thing, a manifold of unequal rights. Thus it is impossible to speak here of right in general, except to say that it is heterogeneous, i.e. that there is no such thing. As a result of this, the expression "subject of a right" is, by itself, meaningless in connection with feudal society because there is no one single class of right-holders. In bourgeois society, on the other hand, there is no additional information required in respect of such an expression, because it is immediately clear who the subject is without asking: the subject of a right is here neither lord, vassal, serf etc., but simply the abstract "subject".¹

1. It is, of course, merely supposed here and elsewhere that this abstract legal subject automatically bears the qualities of non-infancy, non-idioty. The negative terms are preferable to adulthood, sound-mind etc. because we shall see, this "subject" is essentially a property relation.

These kinds of conclusions are important even if they seem obvious. Thus it is only in bourgeois society that the "subject of a right" becomes actuated as a category of legal thinking, because it is only here that such an abstraction can have any meaning independently of being qualified in respect of some particular social class of one kind or another. Accordingly, something so innocently universal in appearance as the notion "subject of a right", when it finds application as such, is marked at the outset as particular, for it is uniquely an achievement of modern legal thought that a simple right-bearing unit has application without further specification in regard of the subject to whom it is applicable.

2. In purely formal terms: the form of right in general, i.e. as merely a form of equality, stands opposed to the form of individuality in general. Individuality and equality are mutually exclusive categories, each repulses the other. This is because individuality means that which is different and distinct, whereas equality is sameness. In so far as X is an individual, he is unlike all others.

Consequently, individuality is never the basis of a legal right. The only exception to this is the case where a right exists for the sake of one person and one person alone. As soon as a right is shared by two

people, its basis ceases to be individuality. The foundation of legal right is therefore always non-individuality - which is precisely what makes the character of law always a social question, a question that has to do with the nature of the social ties between man and man.

Naturally the attempt to make individuality the basis of legal right has been the source of the most incredible feats of philosophical acrobatics in the history of modern legal thought. This is because beginning with individuality, in the above-mentioned sense of the word, has entailed its immediate negation in order that the members of this class may be subsumed under the category of right, that is, in order that individuals (who are all by nature different) may be made equal. Now unless the form of right is to disappear completely by being sundered into the manifold of individuality, the inevitable result of such a procedure is that individuality is turned into something other than that which it is supposed to be, whereupon the category of "abstract individuality" (or something of the same essential nature) makes an appearance.

The above procedure of making individuality the basis of law is, needless to say, characteristic of specifically modern legal thought, because only in bourgeois society does law appear as "abstract individuality". Again, this appears to coincide with the form of right in general where a right, whatever the society, is always the abstraction from, and in this way an equalisation of, individuals. But it is only in bourgeois society that this category of "individuals" operates as such, that is, without any further specification as to which social class of individuals is being reckoned with. Consequently, the abstract antithesis of individuality and equality is a specific expression of the form of modern law and it naturally finds its classic formulations at a time when bourgeois society is making its revolutionary advances in the face of the decaying fetters of the ancien regime. Thus Kant, for example, makes the individual give himself up to the equal measure of right by giving individuality a "faculty" for so doing; and Puchta says, "The principle of right has been bestowed upon man as a spiritual element inherent in his constitution",¹ while Savigny claims that,

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1. Puchta, G.F., Outlines of Jurisprudence as the Science of Right, p.20.

"All law exists for the moral freedom indwelling in every individual man."¹ In all these cases the individual man is made out to be source and foundation of law. Accordingly, part and parcel of his individuality must be turned into its opposite, into an inherent ability to cast aside his individuality so that he can actuate something in common with others and thus realise the principle of right. The result is "abstract individuality", which, as such, as a category in its own right, is uniquely an expression corresponding with the form of bourgeois law.

To talk merely of "man", the "individual", the "subject", or to use one or another expression which abstracts individuality, to do this in connection with the form of law, is to talk specifically about a particular form of law which subsists as a generalised equivalent form, that consequently recognises no distinctions as regards this or that class of individuals. To do this, in other words, is to express the form of bourgeois law.

The individual, as such, acquires rights plainly in spite of his individuality, because holding a right means that he shares it with someone else. This does not mean that the time-honoured phrase, "the rights of

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1. Savigny, System of Modern Roman Law, Bk. 2, p.1.

the individual", is contradictory. Clearly, it is only in bourgeois society that the individual (without distinction as to which particular social class he belongs in) has rights, but this is not to say that this character holds rights because he is an individual. No-one holds rights as an individual, but individuals certainly hold rights. It may also be remarked here that it is not contradictory to demand that individuality be respected; this only becomes so when such a demand brings with it the view that individuality can be enshrined in the form of a right. For, as soon as individuality is properly realised, then, by definition, it determines its own course and becomes what it is entirely of its own accord. Similarly, the demand that nations respect the right of other nations to determine their own affairs is anything but superfluous in the modern age of imperialism, but once a given nation does determine properly its own affairs, once it is truly self-determinate, it is precisely that, i.e. it gets by without guarantee from outside and the right becomes superfluous. To properly respect a right for an oppressed nation to determine its own affairs is just the opposite of demanding that some other nation do the legislating to that effect.

The fact that an individual holds a right bears testimony to the fact that he is not, in this connection, an individual at all, but a member of society. The fact that the right-holder appears as an individual, that is, as an abstract subject, without need of any further differentia, is a condition of bourgeois society which achieves this result on the basis of a wholesale erosion of individuality proper.

3. In bourgeois society, right becomes equal right, which is to say, right becomes an equal equivalent form, or, to put it yet another way, right becomes an equivalent form that is generalised, shared by the mass of persons who are thus distinguished merely as individuals. The secret of this equivalent form lies in bourgeois society itself. But what is it in particular about bourgeois society that makes the mass of "persons" equal in this way? This is a question to which we shall address ourselves in the next chapter. Here, we may just anticipate the answer with an illustration.

In his criticism of the Gotha programme, a series of demands drawn up by the German Social Democratic Worker's Party, Marx rigorously exposed the one-sided character of the idea that producers have the right to be rewarded equally, that is, in proportion with the labour which they provide while engaged in a given

productive process. He says:

But one man is superior to another physically or mentally and so supplies more labour in the same time, or can labour for a longer time: and labour, to serve as a measure, must be defined by its duration or intensity, otherwise it ceases to be a standard of measurement. This equal right is an unequal right for unequal labour...It is, therefore, a right of inequality, in its content, like every right. Right by its very nature can consist only in the application of an equal standard; but unequal individuals (and they would not be different individuals if they were not unequal) are measureable by an equal standard only in so far as they are brought under an equal point of view, are taken from one definite side only, for instance, in the present case, are regarded as workers only and nothing more is seen in them, everything else being ignored. Further, one worker is married, another not; one has more children than another, and so on and so forth. Thus, with an equal performance of labour, and hence an equal share in the social consumption fund, one will in fact receive more than another, and so on. To avoid these defects, right instead of being equal would have to be unequal.

This statement is highly illustrative of the conceptual equipment required in grasping the form of law. Marx's criticism here is essentially that the German workers had ensnared their demands within the principles of bourgeois law. Now this is not immediately clear because the statement doesn't even mention the term "bourgeois"; on the contrary, Marx talks explicitly of law in general. Thus: "...a right of inequality.. like every right," and "(r)ight by its very nature.." et

1. Marx, Marx/Engels Selected Works, 1 Vol., p. 320.

In other words, these criticisms have nothing to do with bourgeois right in particular. The criticism is universally applicable, namely, equality is not achieved by considering the same measure in relation to different things (even though these different things must in at least one regard be the same in order that they may be logically subsumed under the measure). Or, to use a numerical analogy, if we have the numbers 5, 6, 7, 8 ... etc., and then add to each of them the equal measure of 1, we do not equalise those numbers (even though they all avail themselves of the measure - because they all have the logical character of numbers); clearly by such a process we sustain exactly all the initial differences of each with every other. This is the criticism of right in general, i.e. of right as an equal standard.

But Marx doesn't just criticise right as an equal standard, he criticises it as a particular equal standard, as an equal standard which consists in the measure of labour-time (duration) or labour-intensity (non-duration, i.e. a measurable amount of some other quality of labour). Now it is precisely this equal standard, the equality of human labour, that lies at the roots of the modern legal form. In no other society than bourgeois society is the principle of equal human labour, and hence of equal right,

fully realised. But the precise connections between the two, we must leave until later.

These connections, however, are what are at the back of Marx's mind in the foregoing criticism. The principle of equal right on the basis of equal human labour is a very particular equal standard and is by no means characteristic of the form of law in general. It is the yardstick of specifically bourgeois law. Thus, although the demand of the German workers that labour be rewarded in proportion with the labour provided has the appearance of a progressive focus of struggle in the face of productive relations which reward labour only in proportion with the labour expended over the production of exactly what it gets, i.e. the wage-value, which excludes that labour which is expended over the production of not only the value of equipment, tools etc., worn out over the course of the given productive operation, but also a surplus value which appears in the form of profit, interest etc., although this demand appears challenging, it is in fact based upon the exact same principle. Under bourgeois conditions, labour is, on average, rewarded equally, i.e. in proportion with the labour-time embodied in the product of a given productive operation. But this riddle we shall also leave to be elaborated later on.

All that needs to be said here is that equal right means an equal standard, and if that equal standard has for its basis human labour, then for the latter to serve as such it must be commensurable, because there is no equality without commensurability. Moreover, for human labour to be commensurable, for it to be reckoned by time or intensity, it must be homogeneous social labour, which, in turn, supposes very definite social conditions under which the manifold of productive tasks are in common undertaken. Again, we shall come to these things in detail later on, but it is precisely these conditions that are concealed behind the generalised equivalent form of modern law. Only where labour has become homogeneous social labour, where, consequently, the products of labour and labour itself are all commodities, where in other words, the dominant social relation between man and man is that of commodity-ownership; only here does it become possible for the mass of people to be subsumed as equals under the legal form of an abstract right-bearing unit. The generalised form of commodity ownership is the key to the generalised equivalent form of modern law.

4. The foregoing remarks all take very seriously the form of law as an equivalent form, and in particular, the form of law as an equal or generalised equivalent form, which is the special form of modern law. But

the need to make this kind of remark is symptomatic of a very profound antithesis, because law is "obviously" a relation of power, or at least it always comes dressed with the trappings of power. The consideration of the form of law as an equivalent form eventually has to come to terms with the following antithesis: law as such is opposed to power. This at least is the case with bourgeois law since the equivalent form is here generalised and as such it recognises no differentiation of rights in respect of any particular social grouping. If the form of law consists in an equivalent form of persons (and by this word "persons", it is to be noted, we can only mean bourgeois law, when it stands in this way without any qualification in regard of any particular social class), then, on its own terms, there can be no one or more persons holding sway over any one or more of the others. If we suppose that law consists in a generalised relation of equality, then, as such, it is completely antithetical to the relation of power, which, merely in formal terms, consists always in the domination or preponderance of one "will" over that of another. In other words, we have a profound contradiction on our hands: on the one hand, the form of law is essentially a generalised equivalent form; on the other hand, it always appears under the auspices of state power.

Clearly, this antithesis is already supposed in, and develops directly out of, the primary antithesis of law, i.e. as an equivalent form of individuals. The solution to the riddle of this primary antithesis we have already anticipated: as the opposition of individuality and equality, in other words, as "abstract individuality", it becomes basically a question that concerns the generalised form of commodity relations in bourgeois society. Individuals become equalised as such under the form of law as a condition of generalised commodity ownership. But this solution, since we have merely anticipated it rather than actually demonstrated it, naturally remains to be fully elucidated. It is, therefore, to take too much on trust to anticipate further the solution to the riddle of the second antithesis, the dualism of law and state power, which develops directly out of this primary one. On the other hand, the character of this second antithesis is already clear (and posing the problem clearly is always a step in the direction of its solution), it is the opposition of law, as a generalised equivalent form, with its natural resting place in the domain of political power.

In fact (if we may be permitted to anticipate one final time) the solution of this second antithesis in the process of modern law is that it is never reconciled,

except as a contradiction. We shall deal with this in detail in chapter three and, in a rather different fashion, elsewhere. Here, it will suffice to say that law, as essentially an abstract equivalent form, is not actual as such, but only becomes so when it is "touched", so to speak, with the trappings of external authority. But, the moment that this occurs, however, the equivalent form is negated and the language of equality which, figuratively speaking, it came prepared to pronounce, is immediately compromised. This dualism, which appears in numerous forms, has its roots in the specifically bourgeois condition that the individual interest (upon which the legal form is premised as an equivalent form) stands opposed to the social interest.

5. The form of modern legality is to be considered, therefore, as a process consisting in two essential antitheses. Firstly: as an antithesis of individuality (as many different individuals) and equality, i.e. as the problem of the abstract subject, which somehow manages to suppose in this way that the mass of the community can be brought together under one uniformly equal legal standard. Secondly: as an antithesis of this legal equivalent form and state power, i.e. as the problem of how an essentially equivalent form accomodates and becomes accomodated under a relation

that is logically opposed to it, namely, the relation (just in purely formal terms) of super- and subordination.

Our aim in chapters 2 and 3 will be to get at the material elements working behind these antitheses. Firstly (in chapter 2), the material elements behind the (first) antithesis of individuality as such, as concrete individuality, and equality; that is to say, the material elements of the generalised commodity structure which lie behind the notion of the abstract subject. And secondly (in chapter 3), the material elements behind the (second) antithesis of this legal equivalent form and state power, namely, the opposition of private and social interests premised in the opposition of private property in general, i.e. as generalised commodity ownership (whence the legal abstract subject), and private property in particular, i.e. in regard of private ownership of the means of production, whereupon the state becomes increasingly compelled, in the interest of capitalist production as a whole, to compromise the narrow shell of egotistical private interest upon which the form of legality is grounded.

Part I

Ch. 2. Legal Relations and the Relations of Production and Exchange: Basic Interconnections.

a. The Equivalent Form of Property
in Exchange

b. The Equivalent Form of Commodities
and the Equivalent Form of Persons.

c. Commodity Production and Legal
Relations:

1. Generalised Commodity
Production.

2. Petty Commodity Production.

Legal Relations and the Relations of Production and Exchange:

Basic Interconnections.

In bourgeois society, unlike in any other previous society, the mass of people become subsumed under the equivalent form of an abstract right-bearing unit. Here, each becomes the subject of the same general set of rights and the category, "subject of a right", becomes historically quite distinct as something that is synonymous with a general social equivalent form.

Now it is a very old lesson that there can be no equality without commensurability. No two things can be equated without measure, but measure needs to be of something.¹ From the standpoint of modern law, then, it seems that the mass of people are commensurable in a rather mysterious way, for right is not height. To cut the matter short, this measure is, in a word, money, or, at least, money furnishes the secret of this particular commensurability of "persons" in bourgeois society.

1. Measure can neither be just a quantity, nor simply a quality. It is, in fact, a unity of the two, a qualitative quantum. cf. Hegel, Logic, p. 172 et seq.

However, with this magic word, the problem of the form of modern law is far and away from being solved. Indeed, in the same way that the modern "subject of a right" indicates a general social equivalent form which remains a riddle to be solved, so is it the case with the notion of money and the commodities which it somehow renders equal in the act of exchange. Just as the individual gives himself up to the measure of law, so the problem is transferred in the commodity giving itself up to the measure of money. That it is the same problem which is here transferred is, of course, merely a supposition yet to be justified. The supposition is, that the "economic" relation contains the secret of the "juridical" relation.

It follows that one of our primary tasks in this chapter will be to consider the nature of the equivalent form of commodities in bourgeois society. It is this which furnishes the material basis of the equivalent form of "persons" in the modern "subject of a right" or, using Savigny's term, "jural relation". Thus, it will also be our task to show how the equivalent form of commodities or, what is the same thing, the equivalent form of property in exchange, becomes the equivalent form of "persons", in other words, how the "juridical" moment grows out of the "economic" relation.

Before we set about these tasks, one especially important point must be observed. We are here dealing with the form of law as an equivalent form, which as a general equivalent form is specifically the form of modern law. The basic category of modern legal thought, the general right-bearing unit, is a form under which the mass of "persons" become thus subsumed as equals. As we have already made clear in the introductory remarks upon right and equality, there is a great deal more to the matter than just this, in other words, it is not simply a matter of some kind of legal authority declaring its will that all men of sound mind etc. be treated equally. However, as an equivalent form, law logically stands in an antithetical position vis a vis the relation of power, considered just simply as a relation of super- and subordination. Yet it is quite clear that law always appears merged with political authority and ultimately depends upon it. Consequently, to suppose the form of law as an equivalent form is to suppose at the same time that it is just the opposite of the form in which it actually appears, as a relation of power, the dominance of one will over that of another. In what follows we shall merely suppose this antithesis and shall defer discussion of it until chapter three.

The Equivalent form of Property in Exchange

Property in exchange is the commodity-form of property. As such, it possesses a two-fold character: the commodity, as an article of exchange, is also a use-value. This dual nature of commodities, as articles of consumption and as articles of exchange, was acknowledged by Aristotle, who says: "...every article of property admits of two uses..To take, for example, a shoe, there is its use as a covering of the foot and also its use as an article of exchange.. The same is true of all other articles of property; there is none that does not admit of use in exchange."¹ Aristotle could not, however, get to the bottom of the equivalent form embodied in commodities, the form rendering possible their "use in exchange". Marx presents Aristotle's difficulty as follows:

In the first place, he (Aristotle) clearly enunciates that the money-form of commodities is only the further development of the simple form of value - i.e. of the expression of the value of one commodity in some other commodity taken at random; for he says: 5 beds = 1 house, is not to be distinguished from 5 beds = so much money.

He further sees that the value-relation which gives rise to this expression makes it necessary that the house should be made qualitatively the equal of the bed, and that, without such an equalisation, these two clearly different things could/

1. Aristotle, Politics, p. 22.

could not be compared with each other as commensurable quantities. "Exchange", he says, "cannot take place without equality, and equality not without commensurability". Here, however, he comes to a stop, and gives up further analysis of the form of value. "It is, however, in reality, impossible that such things can be commensurable" - i.e. qualitatively equal. Such an equalisation can only be something foreign to their real nature, consequently, only "a makeshift for practical purposes."¹

So, for Aristotle, although both the properties of use and exchange value inhere in the commodity, the one is "proper to the article and the other not."²

Later on, Marx adds, appropriately, that the greatness of Aristotle's genius is illustrated by the fact that he got this far, that he recognised exchange value as a problem which apparently thwarted all attempts at a rational solution.

Aristotle fully understood that money could only express an equivalent form in commodities themselves, that the measure itself does not render things commensurable. Today, over two thousand years after Aristotle, vulgar economists still carry on as if it were self-evident that money, having supplanted God's old role, is "the measure of all things". In the same way the equality of "persons" is self-evident to the modern lawyer with his right-bearing unit of currency.

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1. Marx, Capital Vol. 1. , p.65.

2. Aristotle, Politics, p.21. cf. Ethics, p. 103-4.

In fact, the equivalent form of commodities, of which both money and, in a different way, the modern right-bearing person are expressions, is a very complicated matter.

The equivalent form of commodities, or, property in exchange, is the problem of value in exchange. Returning to Aristotle, it is the problem of how the bed is made the equal of the house, the shoe etc., or rather, how so many beds equals so many houses etc. The answer, the secret of the equivalent form of value, is that equal amounts of human labour are materialised in the products which figure in the given equation. The classical political economists, especially Smith and Ricardo, had moved a considerable way because and in so far as they held fast with this basic axiom, but it wasn't until Marx appeared on the scene that the theory of value was fully worked out. For our purposes here, however, we can simply stay with Marx and Aristotle. The reason why Aristotle gave up on the form of value, Marx tells us, is that equal human labour for him was inconceivable. The reason Aristotle could not penetrate the equivalent form of commodities is the same as that which prevented him from considering the possibility that it arose from equal amounts of human labour embodied in them:

There was, however, an important fact which prevented Aristotle from seeing that, to attribute value to commodities, is merely a mode of expressing all labour as equal human labour, and consequently as labour of equal quality. Greek society was founded upon slavery, and had, therefore, for its natural basis, the inequality of men and of their labour-powers. The secret of the expression of value, namely, that all kinds of labour are equal and equivalent, because, and so far as they are human labour in general, cannot be decyphered, until the notion of human equality has already acquired the fixity of a popular prejudice. This, however, is possible only in a society in which the great mass of the produce of labour takes the form of commodities, in which, consequently, the dominant relation between man and man, is that of owners of commodities. The brilliancy of Aristotle's genius is shown by this alone, that he discovered, in the expression of the value of commodities, a relation of equality. The particular conditions of the society in which he lived, alone prevented him from discovering what, "in truth", was at the bottom of this equality.

There are some very important points condensed within this statement and we must take careful note of them.

Marx expresses here a condition whereupon his own theory is made possible, namely, that human equality has established itself with the "fixity of a popular prejudice". But this is not all (the words here could seem ill-chosen, for popular prejudices are often fleeting). This particular notion of human equality figures as a condition which arises directly with the social form of exchange, a form which appears "only

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1. Marx, Capital Vol. 1, p.65.

in a society in which the great mass of the produce of labour takes the form of commodities, in which.. the dominant relation between man and man, is that of owners of commodities". It is precisely this social form of exchange (not its mere logical form), bringing with it the equivalent form of "persons" as owners of commodities, which develops it as the form of law. But we shall come to this later.

There are two sides to the nature of exchange value which are both illustrated, in different ways, by Aristotle: the logical and the historical. Aristotle was undoubtedly correct to suppose that property in exchange, expressing itself as a quantum (so much money), could not be a mere quantum, but had first to be a qualitative relation in order to appear as a quantitative one. Aristotle, the founding father of philosophical logic, was, needless to say, logically correct: quality then quantity. Moreover, he was "correct" again in his failure to apply his logic to the conditions of exchange of goods in his own society. He said that exchange supposes a relation of equality. If he had gone further and said that exchange supposes a relation of equal amounts of human labour in the commodities on either side of the exchange equation, this solution would still have been impossible.

The reason for this is that the rational form of exchange is contradicted so long as slavery forms the productive base of society. Slavery, consequently, provides definite limits to the development of the exchange economy.

"The secret of the expression of value" is that "all kinds of labour are equal and equivalent, because, and so far as they are human labour in general". The phrase "because, and so far as" is an important conjunction here. It expresses the essential unity of the logical ("because") and the historical ("so far as") in the nature of exchange value. Slavery is a definite barrier against making all kinds of labour equal, a clear and unambiguous constraint upon the realisation of human labour as human labour in general. Aristotle couldn't make the form of exchange value rational because the institution of slavery, which was perfectly natural to him, could not do so either.

Logically, the equivalent form of property in exchange expresses equal amounts of human labour. Historically, corresponding with this, the exchange economy and trade generally is only developed so far as human labour has become human labour in general, or, to give it a more technical-sounding term, so far as human labour has become homogeneous abstract social

labour. The institution of slavery contradicts this development. Consequently, slavery can only develop petty commodity production and exchange, it contradicts the logic of exchange value. Slavery cannot make the form of exchange value rational and as trade and commerce become increasingly significant, as they become developed to their limit under such conditions, as in the later Roman Empire, one or the other must give way. This contradiction between the forces and relations of production and exchange furnishes here the material basis of the famous decline and fall of Rome.

In Aristotle's day, petty commodity production was a great deal less developed than that realised under the later Roman Empire. Thus it is no surprise that the expression of value, as it appeared in the development of a money economy amidst the unstable anarchy of the city-states, appeared also as "a makeshift for practical purposes", for that, by and large, is what it was. The labour of antiquity, slave labour for the most part, did not meet with the contradiction that it was to be rendered equal with other forms of human labour because production for exchange only existed in a very rudimentary way.

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H. Arendt, *The Human Condition*, p.74.

According to this author, this rigid brute/human dichotomy is "the reason for the much misunderstood Greek theory of the non-human nature of the slave". She continues:

"Aristotle, who argued this theory so explicitly, and then, on his deathbed, freed his slaves, may not be so inconsistent as moderns are inclined to think. He denied not the slave's capacity to be human, but only the word 'man' for members of the species mankind as long as they were totally subject to necessity." - *ibid.* The inconsistency, however, is still with Aristotle, because if the slave has "the capacity to be human", as Arendt puts it, then, in Aristotle's own terms, he need not be subject to necessity. In other words, "necessity" here is not absolute, but social. Necessity, for Aristotle, however, meant necessity, that is to say, natural necessity, and as a result of this he never managed to get out of the circularity involved in saying that a slave is a slave because he is a slave. Thus: "Whoever, therefore, are as much inferior to their fellows as the body is to the soul, or the brutes to men (and this is in reality the case with all whose proper use is in their bodies, and whose highest excellence consists in this part), these, I say, are slaves by nature ... He then is by nature formed a slave, who is fitted to become the chattel of another person, and on that account is so, and who has just enough reason to perceive that there is such a faculty, without being indued with the use of it". -

Aristotle, *Works*, p. 12-13. The phrase

"chattel of another person" is quite contradictory since it accredits the slave with the mutually exclusive qualities of the person and the thing, and Aristotle, recognising this, does not get rid of it by qualifying the personality here with "just enough reason to perceive etc.", for to admit this is to admit the quality of personality while trying to exclude it.

Consequently, for Aristotle, the institution of slavery as social labour figured not as a contradictory mode of expressing value in exchange with other forms of labour, but as a mode of excluding necessary labour from the activity proper to free men. Arendt makes this latter point when she writes:

The institution of slavery in antiquity, though not in later times, was not a device for cheap labour or an instrument of exploitation for profit but rather the attempt to exclude labour from the conditions of man's life. What men share with all other forms of animal life was not considered to be human.

The crucial point which is emphasised in all this is that the form of value cannot be considered independently of its social character. Aristotle could not discover "in truth" the equivalent form formally embodied in exchange because the society of his day did not have this "truth", it had, in fact, just the opposite, unequal human labour. Slavery, generally, is a barrier against the rational development of exchange. It is specifically bourgeois society which furnishes the historical conditions under which the form of value becomes rational. It is specifically bourgeois society which realises the principle of equality in all forms of human labour. Here petty commodity production becomes generalised commodity production and human labour becomes, par excellence, human labour in general.

From this it follows that to talk about the equivalent form of commodities is really to talk, specifically, about the equivalent form of commodities in bourgeois society, because it is only in bourgeois society that its principle, equal human labour, is fully and properly realised, because it is only in bourgeois society that production is, absolutely, production for exchange, where, consequently, human labour is realised as human labour in general, or, what is the same thing, as homogeneous social labour. It follows, moreover, that it is only when these conditions have been established historically, that the form of value can be properly comprehended and thus yield the novel insights into the contradictory character of exchange under previous conditions. The anatomy of man, as Marx said, is here the key to the anatomy of the ape.

The form of value is thus a social relation of bourgeois society. Its "application" to previous societies therefore yields the correct result that it is not there as such, but only as something increasingly irrational depending upon how far exchange has become developed under conditions which contradict its principle of equal human labour.

However, we cannot go much further without saying what it is in particular about bourgeois society which enables it to realise the principle of equal human labour, and thus produce everything, so far as it is earthly possible, as articles for exchange on the market. The secret lies naturally in the relations of production, but to say that these are characterised with the aim of realising human labour as homogeneous social labour, that is to say, by the aim of producing exclusively for exchange, although true, is a rather circular process of argumentation. We have to say something more about the character of the relations of production themselves. Moreover, we have yet to bring the form of law into the picture. Why is the form of value so important in this connection? In a word, it furnishes the form of modern law in as much as it is the material basis of an equivalent form. The whole business here turns on the social development of this equivalent form, which is, simultaneously, its legal development. Of course, in pre-capitalist societies, where the exchange form is relatively undeveloped, its implications for generating legal categories is correspondingly diminished, although, as we shall see, in Roman law,

because commodity production had been developed to a high level of sophistication given the limiting conditions of slavery under which this development was constrained, an apparently "modern" system of legal reasoning appeared alongside it. But all these questions, production relations, legal relations and their connections, we shall come to in a moment. Before we do this, however, there is a little more which may be said on behalf of the form which provides the basis of these connections, namely, the equivalent form of commodities.

Clearly it is not the use-value performed by the individual labourer which, under bourgeois conditions, is equated with all other forms of labour. The welder does not perform the same task as the herdsman, and neither of these perform the same task as the clerk, and so on and so forth. What renders these manifestly different activities equal such that their products may relate to each other as values is the productive system under which these tasks are in common performed. The productive system which develops to perfection human labour as abstract, homogeneous social labour is that system which produces exclusively for exchange, in a word, the system of capitalist production, or, what is the same thing,

generalised commodity production. The equivalent form of property in exchange, depending upon its social development, expresses the extent to which human labour has become homogeneous social labour, and the homogeneity of human labour, in turn, is a condition of the historical development of production for exchange. The whole business here turns on the extent to which production is production for exchange. This depends entirely upon the relations of production. The equivalent form of commodities thus expresses in its essentially social character, a relation of production. Moreover, without actually looking in detail at the form of law (except in so far as we need to suppose that it expresses an equivalent form with a material basis, that is to say, that it is a social development of an equivalent form) and without looking at the specific character of the relations of production, it is already apparent, in merely considering the equivalent form of commodities, that both legal and productive relations are essentially bound up with one another. But we shall come to the explicit character of these connections in a short while.

As a final illustration of the character of the equivalent form of commodities, we may mention once

more its measure (not least because a good deal of confusion surrounds this). Measure appears as magnitude but is not synonymous with magnitude as such. The measure of value in exchange realised by a given commodity is a socially necessary quantum of labour-time expended throughout the course of its production. The measure here appears as a quantum (5 hours social labour), but even in this the quantum is never independent of the qualitative relation (social labour, socially necessary labour). This is made clear by Marx when he writes:

Some people might think that if the value of a commodity is determined by the quantity of labour spent on it, the more idle and unskillful the labourer, the more valuable would his commodity be, because more time would be required in its production. The labour, however, that forms the substance of value, is homogeneous human labour, expenditure of one uniform labour-power. The total labour-power of society, which is embodied in the sum total of the values of all commodities produced by that society, counts here as one homogeneous mass of human labour-power, composed though it be of innumerable individual units. Each of these units is the same as any other, so far as it has the character of the average labour-power of society, and takes effect as such; that is, so far as it is no more than is socially necessary. The labour-time socially necessary is that required to produce an article under normal conditions of production, and with the average degree of skill and intensity prevalent at the time. The introduction of power looms into England probably reduced by one-half the labour-time required to weave a given/

given quantity of yarn into cloth. The hand-loom weavers, as a matter of fact, continued to require the same time as before; but for all that, the product of one hour of their labour represented after the change only half an hour's social labour, and consequently fell to one-half of its former value.

The magnitude of value, labour-time, as a measure, is inseparable from the social development of commodity production. Marx's model here, without being explicitly stated, is the capitalist model, because production is supposed to be exclusively production of commodities.

The equivalent form of commodities thus becomes, materially, a socially determined quantum of labour-time expended over the course of their production. This value, which can only appear and be realised in the act of exchange, conceals, without need of being explicitly stated, a definite relational integument of specifically capitalist production, because, as is illustrated in the quote taken from Marx, all labour is supposed as homogeneous social labour, which is a condition of capitalist society alone. Hereinafter, when we shall have cause to speak of the equivalent form of commodities, or, more often simply the equivalent form (since its social

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1. Marx, Capital Vol. 1, p.46.

development by no means stays with commodities),
it is important that this connection is never
lost sight of.

The Equivalent form of Commodities and the Equivalent form of Persons.

The equivalent form of commodities, we have said, is a social relation expressing equal human labour. The "truth" of this matter is realised only in bourgeois society, for in other kinds of society it is systematically contradicted by inequalities in the various forms of labour, where, accordingly, production can only ever by petty commodity production. Now in law, the equivalent form of commodities becomes an equivalent form of persons, and this also is a "truth" which is only fully appropriate to bourgeois conditions of social production.

How does the equivalent form of commodities become an equivalent form of persons? The commodity is property in exchange. Property is a relation of person to thing. Therefore the commodity as such never exists independently of an owner. As Marx says:

Commodities are things, and therefore without power of resistance against man...In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another, as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must, therefore, mutually recognise in each other the rights of private/

private proprietors. This juridical relation, which thus expresses itself in a contract, whether such a contract be part of a developed legal system or not, is a relation between two wills, and is but a reflex of the real economic relation between the two. It is the economic relation that determines the subject matter comprised in each such juridical act.

Two kinds of relationships may be distinguished here, the relation between commodities as equivalents,² and the relation between the participants in the exchange act. Each of these relations is a condition of the other. The commodity, being inanimate, cannot take itself to market, and the person, without the commodity in his possession, has nothing to take. Exchange supposes both commodity and person on either side of the act. However, what puts the person in the exchange act in a relation of equality with his opposite number is not his will as such, but his will as a personification of the commodity. It is the commodity which furnishes the equivalent form, not the person. People do not automatically relate to one another as equals except on condition that they recognise in each other something which may be rendered equal without addition or subtraction. This condition is provided directly with the commodities which each holds in his possession

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1. Marx, Capital Vol. 1, p.88.
2. It is to be assumed, for simplicity's sake, that the commodity need not be distinguished from its money equivalent.

upon the initiation of the business of exchanging them. This is the sense in which the mutual agreement between the two wills, is "a reflex of the real economic relation between the two".

It is to be pointed out that the reflexive character of the "juridical" moment in the exchange act by no means corresponds with some sort of illusory quality. It is an absolutely necessary result which comes hand in hand with the fact of both person and commodity being necessary on either side of the exchange relation. On the other hand, we shall see, this doesn't prevent the equivalent form of persons giving rise to the most fantastic illusions.

Let us make quite clear what this equivalent form of persons amounts to. It is the form of the individual in the strictly limited sphere of commodity exchange. Here the "person" figures essentially as the "will" of his commodity and it is only as such that he becomes the equal of his opposite number. "What chiefly distinguishes a commodity from its owner," says Marx,

is the fact that it looks upon every other commodity as but a form of appearance of its own value. A born leveller and cynic, it is always ready to exchange not only soul, but body, with every other commodity, be the same more/

more repulsive than Maritornes herself. The owner makes up for this lack in the commodity of a sense of the concrete, by his own five and more senses. His commodity possesses for him no immediate use-value. Otherwise, he would not bring it to the market. It has use-value for others; but for himself its only direct use-value is that of being a depository of exchange-value, and, consequently, a means of exchange. Therefore, he makes up his mind to part with it for commodities whose use-value is of service to him. All commodities are non-use-values for their owners, and use-values for their non-owners. Consequently, they must all change hands. But this change of hands is what constitutes their exchange, and the latter puts them in relation with each other as values, and realises them as values.

For commodities to exchange they must have owners who recognise in one another their likeness. The basis of this inheres in the commodities themselves.

To recapitulate: Commodities cannot exchange themselves, they need an owner to personify them. In this way a "juridical" moment appears in the exchange act, which refers to the relation between the persons participating in the exchange. Clearly it is a necessary relationship. Marx, whom we have already quoted in this connection, says quite specifically (and it is sufficiently important to bear repeating) that, "In order that these objects may enter into relation with each other as commodities, their guardians...must...mutually recognise in each other the rights of private proprietors." In other

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1. Marx, Capital Vol. 1, p.88.

words, such a recognition is a logical condition upon which commodities actually appear as commodities. The commodity is the form of property in exchange, and for commodities to exchange, for them actually to realise their implicit value in exchange, they must change hands between their owners, who, moreover, must recognise each other as owners, and furthermore, as "rightful" owners, at least in the rudimentary sense that each does not appropriate, without alienating an equivalent in return, that which belongs to the other.

Now what puts the owners of commodities into relation with each other as equals, recognising as they do the same rights in each other, is precisely the common substance which they both possess as equals, without need of any addition, namely, commodities. It is the commodity-form itself which moves them to the position of recognising the same rights in each. Each party to the exchange does not need to come dressed as a lawyer, all he needs to do is to bring his commodity to the market and have the will to exchange it. Indeed, each party does not need to recognise anything beyond the aim of giving up something in exchange for something else. Each sees here only the object of his own selfish desires, the commodity

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1. Marx, Grundrisse, p.243. The text here from which the quotation is made comprises a large bulk of Marx's rough notes. Hence the appearance of the following important continuation (the Hegelian terms in parentheses are Marx's): "...each arrives at his end only in so far as he serves the other as means; ..each becomes means for the other (being for another) only as end in himself (being for self).. (T)he reciprocity in which each is at the same time means and end.. is a necessary fact, presupposed as a natural precondition of exchange, but, as such, it is irrelevant to each of the two subjects in exchange.. (T)his reciprocity interests him only in so far as it satisfies his interest to the exclusion of, without reference to, that of the other..(T)he common interest which appears as the motive of the act as a whole is recognised as a fact by both sides; but, as such, it is not the motive, but rather proceeds, as it were, behind the back of those self-reflected particular interests." *ibid.* Marx summarises all this in a phrase which graphically captures the essence of the so-called general interest:
"The general interest is precisely the generality of self-seeking interests." - *ibid.*

of the other, and in so doing realises the other's means of attaining this end. The hidden basis of this mutual self-interest is the equivalent form of commodities.

In the act of exchange:

No one seizes hold of another's property by force. Each divests himself of his property voluntarily. But this is not all: individual A serves the need of individual B by means of the commodity a only in so far as and because individual B serves the need of individual A by means of the commodity b, and vice versa. Each serves the other in order to serve himself; each makes use of the other, reciprocally, as his means.

The interest of one is here the interest of all.

It is the material basis of the form of modern law.

The individual, in looking only to himself, satisfies the interest of the other, and that other, looking also only to himself, satisfies the interest of the former. Individual interest in this way becomes at the same time a general interest, and so far as this exchange relation is developed socially it becomes increasingly characteristic of the form of law.

Commodity Production and Legal Relations

a) Generalised Commodity Production.

Where commodity production is generalised the equivalent form of commodity ownership corresponds with the form of law. As commodity owners, the mass of people avail themselves of equal legal personality. The condition of the form of modern law is therefore the condition under which the mass of people become owners and exchangers of commodities. Historically, this condition is provided with the appearance of free wage labour.

Wage labour is free in a two-fold sense, which, according to Marx, means "that as a free man he can dispose of his labour-power as his own commodity, and that on the other hand he has no other commodity for sale, is short of everything necessary for the realisation of his labour-power."¹ Let us take the first sense first. Wage labour is free because and so far as the ability to work is separated from the person in whom that capacity inheres, that is to say, because and so far as labour-power has become an alienable commodity and figures, therefore, as a relation of property, i.e. as a relation of person to thing. In order that he may be able to sell, as a commodity, his ability to work, the wage-worker must,

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1. Marx, Capital Vol. *, p.166.

according to Marx, "be the untrammelled owner of his capacity for labour, i.e. of his person."¹ This additional "i.e. of his person" looks odd, for the subject who owns appears, with this, as the thing owned. If the property relation is to stand as such, it must be a relation of person to thing, and so in this case the thing, the commodity labour-power, cannot be the person of the wage-labourer. If this were not the case, as soon as the labourer sold his commodity he would sell himself. He would revert to becoming a slave. But the riddle is explained by Marx when he adds:

He (the wage-worker) and the owner of money meet in the market, and deal with each other on the basis of equal rights, with this difference alone, that one is the buyer, the other seller; both, therefore, equal in the eyes of the law. The continuance of this relation demands that the owner of the labour-power should sell it only for a definite period, for if he were to sell it rump and stump, once for all, he would be selling himself, converting himself from a free man into a slave, from an owner of a commodity into a commodity. He must constantly look upon his labour-power as his own property, his own commodity, and this he can do by placing it at the disposal of the buyer temporarily, for a definite period of time. By this means he can avoid renouncing his rights of ownership over it.²

In this way the person of the labourer is only apparently inalienable, in the sense that, as distinct

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1. Marx, Capital Vol. 1, p. 165.

2. *ibid.* p. 165.

from the condition of slavery, personality always returns to him as the exclusive owner of it. But this constant "return" must always be a constant return from somewhere, that is to say, the worker's personality, so far as we accept that it inheres in the form of labour, only returns to him on condition that it has been given up by him over and over again. Personality, as active human labour, is alienated as a commodity and consumed by another only to reappear again in the hands of its original owner.¹ The inalienable right of personality in this way expresses a condition of its being constantly alienated in the repeated purchase and sale of the commodity labour-power. But we must look at this peculiar process a little closer.

As with all other commodities, the purchase and sale of the commodity labour-power is an exchange of equivalents. The labourer receives, in return for his ability to work for a given duration, the value of his labour-power, which, as with the value of all

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1. The truth of the assumption that personality is the same thing as that which is repeatedly alienated and appropriated as the commodity labour-power, is expressed in the commonly-held view that one only "comes alive" at the end of the day's work, despite the tremendous effort made on the part of the purchaser of labour-power to get his full "poind of flesh". cf. generally, Braverman, "Labour and Monopoly Capital".

commodities, is expressed materially in the socially-necessary labour embodied in the value given in exchange, in this case the wage-goods that he acquires, indirectly, as a result of having sold this labour-power. In other words, the exchange-value of labour-power, as with all other commodities, is, on average (and here, as throughout, only properly abstract average conditions are supposed), the socially necessary labour embodied in its production.

Concretely, this value is represented in the wage-goods which the labourer receives as a result of having alienated his commodity labour-power in exchange; goods, moreover, which he consumes and in so doing reproduces this latter commodity afresh, ready for re-sale. This then is how the labourer's commodity, the only one which he has to sell, always comes back to him, namely, by exchanging it for the subsistence which reproduces it. Consequently, it is always his, the ability to work, this life-activity inherent in the person of the labourer is his and his alone, so long as he continually alienates it.

Labour-power is, in fact, all the active and creative life-giving potential of man subjugated under the commodity-form of property. The labourer's commodity thus remains essentially himself, his person, says Marx. Yet this seems quite contradictory. The

commodity-form is a form of property, and property is a relation of person to thing. The property relation as person owns person only comes about when the person, as object, as thing owned, is a slave, and in this case both subject and object are separate entities. To say, therefore, that a person owns himself, which is what ownership of the commodity labour-power amounts to, is to say that he is a slave to himself. This is really Marx's point: free wage labour is voluntary slavery. Being possessed of his capacity to work, the wage labourer is no slave; he has the free disposition to do with it as he wishes. On the other hand, the condition of this right is that he has no productive means of his own with which to actuate this labour-power. He must, therefore, sell it - "Hobson's choice". But in order that this process does not take place once and once only, in order that this free and equal transaction be repeated over and over again, it can only apply for a fixed and definite duration; whereupon the wage labourer avoids selling himself into slavery and the repeated alienation and appropriation of labour-power furnishes the inalienable rights of the individual over what is his.

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The purchase and sale of labour-power, taking place as it does in the sphere of circulation or exchange of commodities, is an exchange of equivalents. This we have already mentioned. Moreover, being an act of equal exchange, there is no question here of the seller of labour-power being exploited by the purchaser. However, this equivalent exchange initiates a peculiar process of consumption. As with the consumption of all use-values, the consumption of labour-power is a private matter. What is really purchased in the exchange of labour-power is not merely something for which the equivalent is eagerly provided, but the labourer's capacity, once purchased, to create value way in excess of this outlay. What is purchased here is not just the capacity of the worker to re-create in the value of the product the value of the materials initially laid out on the given productive operation (raw materials, wear and tear of machinery, tools etc. and labour-power itself, i.e. wages) but on top of all this, a new value, a surplus-value, which appears in the forms of profit, interest and rent. This mode of appropriation of surplus-labour, which begins with an apparently free and equal transaction between buyer and seller of labour-power, is the "hidden secret" of capitalist production.

The equivalent form of commodities in the purchase and sale of labour-power and in the innumerable contracts entailed in the purchase and sale of wage-goods means that in law the worker is an equal with his opposite number, the capitalist, from whom he is paid for his capacity to augment the capital-value initially invested in the productive process, and to whom he pays, *ceteris paribus*, for the wage-goods that he, the worker, has produced. The proper meaning of bourgeois legal ideology is therefore that the law does not without truth consider persons as equals, for equals they are so far as they are merely exchangers of commodities, but that in fixing its gaze here, on the form of exchange alone, it systematically prevents itself from considering the less conspicuous relations underlying it. This systematic blindness, we shall see, operates throughout the entire spectrum of modern legal culture rather like the doctrine of original sin in the application of Christian dialectics to culture in general.

To recapitulate: the equivalent-form operates in the exchange of labour-power just as it does with all other commodities. In the exchange of labour-power, the worker receives an equivalent via the social labour embodied in the wage-goods that accrue

to him as a result of this exchange and it is in the consumption of these goods that nature restores afresh that same labour-power ready to begin the process again. Labour-power is thus cheapened, the less social labour there is congealed in the relative means of subsistence, a process which appears concretely in a general attack upon working-class living standards. The point here, however, is simply that in the exchange of labour-power, equivalent is exchanged for equivalent. It is therefore quite erroneous to say that, under capitalist conditions, the worker gets paid less than his value. Exploitation does not take place, *ceteris paribus*, in the realm of exchange. The worker does not get paid less than his value, for his value is what he gets; rather, he gets paid less than the value which he produces, which, under capitalist conditions, includes not merely his own value, the value of his labour-power, and neither merely this alongside the value of raw materials and worn-out equipment re-created in the value of the product, but, in addition to this, also embodied in the value of the product of the given productive process, a surplus-value. It is all for sake of this latter that the entire bourgeois social order clings to the narrow form of equality which



initiates and terminates over and over again its production. At the end of the second part of the first volume of Capital, Marx, in a well-known passage, comments on the realm of circulation, where commodities change hands, thus:

This sphere..within whose boundaries the sale and purchase of labour-power goes on, is in fact a very Eden of the innate rights of man. There alone rule Freedom, Equality, Property and Bentham. Freedom, because both buyer and seller of a commodity, say of labour-power, are constrained only by their free will. They contract as free agents, and the agreement they come to, is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself. The only force that brings them together and puts them in relation with each other, is the selfishness, the gain and private interests of each. Each looks to himself only, and no one troubles himself about the rest, and just because they do so, do they all, in accordance with the pre-established harmony of things, or under the auspices of an all-shrewd providence, work together to their mutual advantage, for the common weal and in the interest of all.

Freedom, Equality and Property (we can forget about Bentham) are the hallmarks of modern legal thought. These categories take on their various guises in modern legal thought in direct response

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1. Marx, Capital Vol. 1, p.172.

to the generalised form of commodity production and exchange. Their legal appearance *sub specie aeterni* is a result which comes about precisely on this account, namely that they are grounded in the specific historical form of generalised (capitalist) commodity production and exchange.

The sphere of exchange, taken along independently of the productive relations which it supposes, appears as a domain of perfect equality and freedom. But the equality here is really only the equality of persons as owners of property in exchange, as exchangers of commodities. This "juridical" moment of the exchange act, however, becomes transformed into a manifold of legal equality. For example, the latter has appeared historically as "natural" equality in natural law theory, and this, in turn has undergone a whole host of metamorphoses under the auspices of the category of "nature". In unreflective legal dogma, in private law doctrine for instance, where no attempt is made to bring anything else to light regarding the riddle of equality, the equivalent form is inclined to rest in its raw state, as merely the "juridical" moment of property in exchange. But all these developments of the equivalent form we shall come to in detail later on. All that we need to note here is that at the roots

of the vast and complex modern legal structure there lies a simple abstract "juridical" form which becomes the legal persona which, as such, becomes fixed as the eternal mystery of "one and all". This persona, in essence, is merely the form of the individual in his aspect as an exchanger of commodities. In this, he becomes a veritable deus ex machina, a living incarnation of property, equality and freedom, because the basis of this process is the form of property in exchange, the equivalent form of commodities, which freely change hands in the market. In this, he becomes, so far as all are commodity owners, the equal of everyone else, because every act of exchange is an exchange of equivalents, whether it is a prince, a parson or a worker who brings his pound of silver to market. Here property becomes, in law, personality, because here, in the sphere of exchange, property is personality. The commodity actuates its "will" through its owner, who, as Marx says, "makes up for the lack in the commodity of a sense of the concrete by his own five and more senses". Consequently, the norms of individual behaviour are here the same as those of everyone else; each looks only to his own selfish requirements and in so doing posits himself as a means for the achievement of his (that other's)

end. The individual interest becomes the common interest, and, by the same route, this form of the individual as a commodity owner, becomes the form of modern law.

Exchange, however, supposes production for exchange, and production for exchange supposes definite relations of production. The act of exchange is, in a sense, the most "obvious" of socio-economic relations, taking place as it does on the surface of society before the eyes of everyone. But the very fact of the individual as an exchanger of commodities supposes that he enters, first and foremost, into relations of a rather different nature, namely, as a producer, for without production there would be no commodities at all let alone the mode in which they change hands and circulate.

The conditions of generalised commodity relations and thus also the universal-abstract character of law which arises therefrom, are the relations of production. These we have considered primarily in connection with free wage labour. But the wage labourer, it is not to be forgotten, is "free" in the double sense: firstly, as a commodity-owner, an owner of labour-power, along with all the rights which come with the legal personality attached thereto, and secondly, "free"

1. Thomas More expressed the dawning of British capitalism when he wrote in his "Utopia",
"These placid creatures (sheep), which used to require so little food, have now apparently developed a raging appetite, and turned into man-eaters. Fields, houses, towns, everything goes down their throats. To put it more plainly, in those parts of the Kingdom where the finest, and so the most expensive wool is produced, the nobles and gentlemen, not to mention several saintly abbots, have grown dissatisfied with the income that their predecessors got out of their estates. They're no longer content to lead lazy, comfortable lives, which do no good to society - they must actively do it harm, by enclosing all the land they can for pasture...Each greedy individual preys on his native land like a malignant growth, absorbing field after field, and enclosing thousands of acres with a single fence. Result - hundreds of farmers are evicted.."
- Bk.1, p.46-7.

In Britain, this and similar forms of expropriation continued throughout the 16th. and 17th. centuries. Legislation on the one hand fought vainly against these acts of violent expropriation, and on the other hand fought viciously against the consequences, namely, the masses of expropriated peasants who became beggars, vagabonds, thieves etc.. Legislation against these latter is striking for its brutal and horrific nature, entailing such punishments (for having been robbed) as branding, ear-cutting, whipping etc.. Later on, as these expropriated masses began to be increasingly made use of as factory fodder, the resulting new-found sources of wealth, in turn furnished appetites and resources for much grander forms of expropriation, and by the end of the eighteenth century, parliament becomes directly involved in it with its Acts for the enclosure of the Common lands. cf. Marx, Capital Vol. 1, p. 676-7.

In the face of this long historical process wherein capitalist property relations come into the world "dripping from head to foot, from every pore, with blood and dirt," Blackstone's legal casuistry is amusing. He writes: "...there are very few that will give themselves the trouble to consider the origin and foundation of this right (to property). Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title..." He continues boldly, "These inquiries (into the means by which the right to property is acquired), it must be owned, would be useless and even troublesome in common life. It is well if the

in the sense of being deprived of all the means of actuating for himself the use-value of his commodity. Wage-labour thus expresses a condition in which the means of production are concentrated in the hands of a class other than itself, namely, a capitalist class of owners. Although Shylock's claim may not be exactly true, and certainly few would want to admit it in his own case, that "You take my life when you do take the means whereby I live", it is clear that the wage-labourer, with no means of actuating his ability to work, is compelled to meet the owner of those means in the market and do business with him; and it is clear moreover, as a glance at the history books shows, that these means have, historically, been taken from him. In Britain, for example, this latter process of the expropriation of the means of production from the mass of direct producers, begins in the late 15th century with the enclosures of sheep-pastures and continues, in one form and another, on an increasingly social scale as capital develops.¹ This

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(note 1 cont..)

mass of mankind will obey the laws when made, without scrutinising too nicely into the reasons for making them." - Commentaries etc., Vol. 2, p.1. For those not engaged in "common life", sufficiently intelligent to understand this mystery, Blackstone's answer begins: "In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man 'dominion over all the earth; and over the fish of the sea..' ..." etc. etc. And modern property rights arise post hoc ergo propter hoc.

bloody history of the separation of labour from the means of production is the secret history of the development of modern law.

The historical separation of labour from the means of production is the basis of free wage-labour. The result is that the labourer must sell, as a commodity, his ability to work to his opposite number in the market. This latter character also figures here as a commodity owner and so both are considered as equal personalities so far as the law is considered. But the basis of this transaction is just the opposite of a relation of equality; its basis is the fundamental inequality regarding ownership of the means of production. The basis of this transaction, the condition compelling the labourer to do business in the market with his opposite number, is that the former has no other means of actuating his ability to work and therefore must sell this ability to the latter in whose hands these means are concentrated. However, it is precisely on account of this basic inequality that labour becomes subsumed under the commodity-form of property, and therefore on this very same account that the mass of persons acquire equal legal personality. Property, as always, is the basis of legal personality, and just as the "capacity to be human" was never the issue so far as Roman legal personality was concerned, neither

is it the case with bourgeois law. The greatest and most significant modern legal development bearing forceful testimony to this is the development of corporate personality, for the whole point of a corporation as a "person" is that it can thereby own property independently of its constituent members.

It is only in modern law, . . . that equal legal personality applies to the mass of persons, and this arises directly as a result of generalised commodity relations. Thus it is only here that the equivalent form of commodity relations furnishes the basis of legal abstraction and generates the general "subject of rights" enabling the development of abstract patterns of legal reasoning characteristic of specifically modern law. On the other hand, it is nonetheless true that, where we find in earlier times legal thought strongly resembling modern legal abstraction, we find, also, the development of commodity relations in some degree of relative sophistication. There are, however, important differences and it is instructive to take note of them.

b) Petty Commodity Production.

Commodity relations, wherever they have become developed on a relatively elaborate social scale,

bring with them as a general rule a corresponding development of legal relations rudely approximate to their fully developed modern form. Nowhere is this more apparent than in the case of Roman law, which gets its highly significant "modern" connections from the fact of a highly developed system of commodity production and exchange politically centered upon Rome and spread throughout the great Empire. Much earlier still, ancient trading nations like the Babylonians or the Phoenicians have, for similar reasons, been noted by legal historians for the rude "modern" character of their law. But let us stay with the classic example of Rome.

Roman commodity production is developed within the fetters of slavery. Consequently, the kinds of legal developments which arose alongside the growth of production and trade throughout the Empire reflect this condition. The slave, even within the "law of nations", which is the most important in this connection, cannot have legal personality and therefore the Romans knew nothing of a general right-bearing unit. Slavery, as a fetter upon the development of commodity production and exchange, is correspondingly a fetter upon the development of legal abstraction. But let us look at these connections in more detail.

One of the highest achievements of Roman civilisation, it is well-known, was its law. This law attains its most comprehensive statement in Justinian's Corpus Juris Civilis. What modern jurists and legal historians have scarcely paid any attention to, however, is that the works of Justinian appear at a time when the Roman Empire was on the verge of collapse - a coincidence which is not accidental. The rational simplicity of the Corpus Juris reflects the material erosion of an irrational system upon which the imperial edifice was grounded. The finite limits to Roman legal abstraction are reached at a time when commodity production and exchange reaches its limits under the irrational fetters of slavery.

The symptoms of these connections are apparent in Justinian's legal writings. Here is an example. In the first title of his Institutes, we observe a very important opposition, an opposition which, in its modern connections, we shall devote some time to in the next chapter, namely, the opposition between public and private law. For Justinian:

The study of law consists of two branches, law public, and law private. The former relates to the welfare of the Roman State; the latter to the advantage of the individual citizen. Of private/

private law then we may say that it is of three-fold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome.

To properly understand the historical limitations operating upon Roman legal abstraction, it is important to get a clear sense of the character of the opposition which is reflected here. Private law and public law figure here as an opposition of interests: on the one hand, the "welfare of the Roman State"; on the other hand, "the advantage of the individual citizen". As an Emperor, as the figurehead representing the interests of the Roman state, Justinian shows a keen awareness of that which opposes his imperial majesty. This "opposition" appears here as private law, and a "politically opportune" mode of dealing with it is, first and foremost, to give it a divided origin - for unity is strength. Thus, private law has a "three-fold" origin, sundered into the "law of nations" (*jus gentium*), the "precepts of nature" and the civil law of Rome. These three are, however, all "to the advantage of the individual citizen". More specifically, they are all to the advantage of a developing form of individuality. It is a form of individuality which develops alongside the growth of

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1. Justinian, Institutes, Bk.1, title 1.

commerce and trade. Thus, "the law of nations...is the source of almost all contracts,"¹ and was, in reality, fast becoming distinguished from the civil law of Rome merely as a genus is distinguished from a particular species of it. The "precepts of nature", on the other hand, is a piece of early Christian rhetoric, or, to be fair, corrupted Christian rhetoric, having become transformed from the language of the oppressed into the language of the powerful. But this does not concern us here.

The important question which transpires from all this is, why is this form of individuality, which is typified in the persona of the jus gentium, opposed to the interests of the Roman state? This form of individuality is in fact the Roman equivalent of the modern persona which springs up alongside the development of commodity relations. The question therefore is the same as that which asks, why is the development of production and trade a threat to the Roman state? And the answer is that such development, by the time of Justinian, is rationally opposed to the slave system upon which it is based. Slavery is both the foundation of the Roman imperium and the fetter upon the rational

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1. ibid., Bk.1, title 2.

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1. Slaves in Roman Society were incapable of lawful marriage. They were considered on rare occasions, and most contradictorily, as persons for the practical purpose of assigning liability in certain criminal matters. In the event of delictual liability only the slave's owner could be legally responsible.

"In commerce slaves were important. In the classical age free hired service was not common: most of the work now done by clerks and servants (!) was done by slaves. Though they could have no property, it was customary from early times to entrust them with a fund, called peculium, sometimes large, in connection with which slaves appear, in the Empire, almost as independent businessmen, contracting with their owners and others as if free. As they could neither sue nor be sued, the master intervened if any question of enforcement arose. As a slave's acquisitions were his master's, the latter could bring any necessary actions, but obligations contracted by the slave did not bind the owner at civil law, and a man would not readily contract with a slave, if he had to rely upon his *naturalis obligatio*, useless while he was a slave, and having little effect if he was freed. The praetor therefore facilitated the employment of slaves in trade by giving actions against the master imposing a liability, varying with circumstances, of which the *actio de peculio* was the most important." - Buckland, Roman Law, p.65.

development of the exchange economy, which, as we mentioned earlier, requires the equalisation of all forms of human labour. The appearance in the "law of nations" of an equivalent form of individuality reflects the increasing instability of the system of slavery which stands nakedly opposed to it. The dualism which Justinian reflected as law public and law private is therefore in essence the contradiction between the institution of slavery on the one hand, and the further development of the exchange economy on the other.

Slavery is the key to the form of Roman law. The slave cannot be included in any category of legal personality.¹ But for our purposes there is only one persona which needs to be borne in mind, and it is that which arises *juris gentium*, with the law which develops alongside petty commodity production and exchange within the Roman empire. It is this legal form which ultimately reduces to a mere question of pride the distinctions attached to the special classes of Roman citizenship and therewith the final significance of Rome itself. But what is especially important is that it is this Roman legal form in particular which approximates most nearly to the basic form of modern law. With this, therefore,

the significance of the different relations of production under which the commodity-form is developed can be most clearly comprehended in their connection with law.

Slavery was *juris gentium*, and it is this which makes the latter completely and utterly distinct from the form of bourgeois law.¹ Basically, the slave is not a person in law because he cannot own property, and he cannot own property because he is, himself, property. Ownership is a relation of person to thing, whereas, morality apart, the slave is merely a thing, or rather, a contradictory person-thing, an *instrumentum vocale*.

Just as property ownership provides the secret of legal personality in modern law, so is it the case in Roman law. The form of property ownership, however, is quite different and, consequently, so is the form of law. In a roundabout way, the jurist, Savigny, gets to posing the essential questions in the matter of slavery and Roman law. He says,

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1. We shall see later on the kinds of contradictions which arise for those historians and others who think otherwise, who think, in other words, that the Roman form provides us with the "origins" of the modern form.

"In order to determine what the Romans actually admitted in regard to this matter (the rights and obligations of the slave in law) it is necessary to distinguish two principal questions. Could the slave acquire credits? Could he contract debts? Or, what is the same thing, could he become a creditor or a debtor?"¹ The economic relation, Savigny realises, is the secret of the juridical relation. The slave could neither owe nor be owed anything because he could not own anything. Whatever he advanced was his master's and whatever he received was his master's also.

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1. Savigny, Jural Relations, p.302. He arrives at these questions in the following way:
"When a Roman slave undertook such acts, from which obligations would have arisen in the case of freemen, their efficacy might come into question under wholly different circumstances: during the condition of slavery and after emancipation. During the condition of slavery, a civilis obligatio was clearly impossible, since the slave could not appear before a court, either as a claimant or a defendant, though a naturalis obligatio was in this condition certainly conceivable. After emancipation, on the other hand, a civilis obligatio, just as well as a naturalis obligatio, was conceivable." - ibid.

The *persona juris gentium* was, therefore, a status category meaning, essentially, "not-slave", not of the mass. Consequently, it is different in both form and content from the modern commodity right-bearing unit. The form of the latter is general and subsumes the mass of persons and therefore becomes the very incarnation of the principle of human equality, whereas in the case of the former, it is still particular and still exists alongside a specifically Roman mode of legal regulation.

Of course, none of this is to say that Roman law ignored the slave; he was, after all, property; and Savigny makes another most important "economic" observation on the issue of slavery in Roman law when he writes:

But as in consequence of the numerous conquests of war the number of slaves increased beyond all measure, and people were taught by a bloody experience how fraught with danger was a wholly cruel treatment of those who, by their numbers, had become a powerful class. So it came gradually to be held as a firmly established rule, that a cruel master could not only be compelled to sell his maltreated slaves, but could also be criminally punished.

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1. Savigny, *ibid.*, p.24-5.

As the slave system matured within the Empire, "concessions" to the producers of wealth appear just as they did when capital similarly made its great moves towards maturity during the 19th century. In the latter case, however, it is a class of free wage-labourers "becoming a powerful class", which, for reasons we shall come to, makes the form of "legal" intervention here very different.

The slave was ignored in Roman law as a legal subject, and this imposed very definite limitations upon Roman legal abstraction. Hegel had this in mind when he wrote in his Philosophy of Right,

But the science of positive law at least cannot be very intimately concerned with definitions since it begins in the first place by stating what is legal, i.e. what the particular legal provisions are, and for this reason the warning must be given: *omnis definitio in jure civile periculosa*. In fact, the more disconnected and inherently contradictory are the provisions giving determinate character to a right, the less are any definitions in this field possible, for definitions should be stated in universal terms, while to use these immediately exposes in all its nakedness what contradicts them.

Hegel had, especially, Roman law in mind here, where there could not possibly be a definition of "man", as he puts it, since "slave" could not be brought under it. Now Hirst and Hindess in their book, Pre-Capitalist

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1. Hegel, Philosophy of Right, p.14-15.

Modes of Production, say of Hegel's view of Roman law that it is a function of his "essentially humanist philosophy: he takes for a failing what is most advanced in this legal form."¹ These notions of "failure" and "advance" are conditional upon each other, and Hegel certainly did not view them as one-sidedly as these authors make out. For Hegel, as the above quotation makes clear, the "failure" (in this instance the fact of slavery) is the limit to the "advance" (the degree of universality embodied in Roman legal definition). Hegel had grasped the dialectical relation between the two; the "failure" here reproduces itself in another form as an "advance". True, Hegel only got at this relationship in a general and idealistic fashion, but Hirst and Hindess display their own more complete one-sidedness when they say:

Roman law provides the basis for an abstract concept of legal personality; a personality which exists in the sphere of law alone and which is attributable to non-human entities, corporations etc.²

This is utterly erroneous, for were it the case that Roman legal personality could be "attributable to non-

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1. Hirst and Hindess, Pre-Capitalist Modes of Production, p.329.
2. *ibid.*

human entities", there would have been no trouble in granting it to the slave. In any case, "Roman law provides the basis...of legal personality" is nothing more than a variation on the tautology "law is the basis of law". Nor is this conceit assisted any with the added contradictory assertion that, "this development of Roman law is a function of post-Roman analytic jurisprudence."¹ This is an absolute impossibility. The mistake of making Roman law, not-Roman law (i.e. "post-Roman" or, what is generally intended, modern bourgeois law) is shared, but with generally more subtlety, by most writers on the subject. The basis of this error rests in a failure to distinguish the forms of petty and generalised commodity production and, consequently, the different forms of legal abstraction arising therefrom. But we shall elucidate this error later on when we come to discuss the idea of the "reception" of Roman law.

In view of the fact that tautologies abound in this area, we may take the liberty of saying here that Roman law is Roman law. And what makes it Roman is the slave

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1. ibid.

system which it reflects. It reflects the latter, for the most part, by being silent; the slave is not a legal person and therefore it does not address itself to him. But before ever it begins: "the first division is into free men and slaves".¹

1. Justinian, Institutes, Bk.1, title 3.

Part I

Ch. 3. Equivalent Form and Legal Form.

- a. Private Law and the "Persona".
- b. The Private/Public Dualism within the Legal Form.
- c. "Public" Law: The Legal Form and State Power.

Equivalent Form and Legal Form

(1) Private Law and the 'Person'

It is precisely the appearance in persons of the equivalent form of commodities (viz. as owners of property in exchange), that gives modern legal abstraction its actual (as distinct from its essential) character. Historically, this is clearly ever more the case, the more developed and generalised has become commodity production i.e. production for exchange. This appearance, this "juridical" moment arises directly out of the act of exchange itself which, as such, is only concerned with individuals in their capacity as mere exchangers of commodities. However, in the actual juridical view of things this slight qualification, that the equivalent form merely concerns individuals in their singular capacity as exchangers, is overlooked. In this way the equivalent form gets transformed, in a fetishised fashion,¹ into a form of equivalence between persons

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1. Fetish, as "(i) nanimate object worshipped by primitive peoples for its supposed inherent magical powers or as being inhabited by a spirit" (Concise Oxford Dictionary), is, of course, used metaphorically here, but not, as we shall see again and again, without justification. Compare Marx, Capital Vol. 1, on "The Fetishism of Commodities and the secret thereof".

qua persons, quite oblivious to its essential and strictly limited basis in the mere exchange relation. Once this distinction is blurred, all manner of difficulties and contradictions arise, and this, empirically, becomes the life-blood of modern legal thought.

The clarity of the connection between the equivalent form of commodities and legal abstraction is most apparent in private law. The equivalent form of commodities posits the equality of persons as abstract individuals engaged in the act of exchange. The form of the individual as a mere exchanger supplies private law (as well as legal abstraction generally) with its most fundamental category, a category upon which the specifically legal edifice is built - the legal person. The legal person is, in essence, the form of the individual as an exchanger of commodities. However, the legal form doesn't appear in this way in actual legal doctrine.

The legal person or abstract legal subject, to which we shall occasionally refer as simply the "legal form", is distinct from what we have previously referred to as the "juridical" moment in

the exchange of equivalents. It is distinct from the latter on this account: the "juridical" moment implicit in the exchange act has a strictly limited nature by way of its implicitness in the exchange relation alone, whereas the legal form, in its various developments, deliberately repulses this connection. The "juridical" moment refers, specifically, to the form of the individual in his capacity as an exchanger of commodities, in his essential capacity as an equal with others. The legal form, on the other hand, is this "juridical" form unconscious, so to speak, of its precise exchange connection. In other words, the legal form becomes the actual or empirical form of the "juridical" moment in the sphere of law. The two are closest together in private law. Private law displays, as a relatively undisguised prototype of the legal form, its essential inner connections with the equivalent form of commodities. Let us now illustrate this.

Although the essence of the legal form is contained in the form of the individual as an exchanger of commodities (and the productive relations therein supposed), it does not appear as such - especially when it is stretched and strained, in

legal theory, to cover such things as the state and law itself. We shall come to this later. To recapitulate, the clarity of the legal form's inner connections with commodity exchange appears, first and foremost, in private law thinking. Here, the legal form appears most clearly as the "juridical" moment implicit in the exchange of equivalents. This "juridical" moment which is contained in the abstract legal subject of private law is nothing more than the individual considered in his aspect as an exchanger of commodities, which in turn supposes, in its abstract generality, a specific social development of productive forces under definite, historically evolved property relations. These particular property relations, moreover, are systematically reduced to indifference at the level of mere exchange of goods. This much we are already familiar with. However, to return to the matter under discussion, the legal form, which has to do with the actual appearance of law, is not exactly the same as the "juridical" form, the form of the individual as a mere exchanger of commodities. Thus, in private law the strictly limited form of equivalence which is consciously acknowledged in the conception of the "juridical" form, appears dislocated from its exchange basis and is posited, in some degree, in persons per se.

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1. Pashukanis, Theory of Law etc., p.136.
(Allgemeine Rechtslehre, p.54). I will take the opportunity here to point out that although references are made, here and elsewhere, to the Babb and Hazard translation of Pashukanis' work, I have taken the liberty on a number of occasions to render the sense more in accord with the superior translation into German by Hajos. The English translation consistently makes a number of jarring literal transpositions from the Russian which are utterly inconsistent with normal usage in the context of the subject matter to which they refer, e.g. 'barter' instead of exchange, 'worker-strength' instead of labour-power, and so forth. Trivial though this may seem, the effect is far from trivial since it makes a number of passages quite at odds with their intended meaning. Pashukanis' work in the "Theory of Law and Marxism" is very rigorous (which is not the case, incidentally, in that other essay which appears in the Babb and Hazard edition, which has an entirely different - indeed, tragic - character to it) and every term here conveys a precise meaning. Thus, when he speaks of exchange, he means this in the context of a definite stage in the development of production for exchange. To render this as 'barter' is quite out of place, since 'barter' applies to a form of exchange where the equivalent form does not exist, that is, where exchange in its modern connection with generalised commodity production, the form of law etc. has absolutely nothing to do with the matter. The complexity of the relations with which Pashukanis deals, moreover, makes this generally inattentive translation doubly unfortunate.

The more abstract legal thought becomes, the greater this dislocation appears and, consequently, the more appropriate becomes the "fetish" metaphor noted earlier. Accordingly, private law has always appeared relatively sound in its detailed internal systematisation - precisely because its categories are nearer to their essential basis. In this connection, Pashukanis wrote:

In reality, it is precisely in the field of private law relationships that the most solid kernel of juristic haziness, if the expression is admissible, is to be found. It is in the concrete personality of the egoistic managing subject - the property owner, the bearer of private interests - that a legal subject such as the "persona" finds complete and adequate embodiment. It is specifically in private law that legal thinking moves with the greatest freedom and confidence, where conceptions take on the most complete and symmetrical form... It is specifically in private law that the a priori premises of legal thinking are clothed with the flesh and blood of two contending parties, defending "their right" - vindicta in hand ...The dogma of private law is neither more nor less than an endless chain of considerations for and against imaginary claims and potential suits. Unseen behind every paragraph of systematic advice stands the abstract client ready to use the corresponding propositions as professional advice.

In private law the equivalent form appears as something arising in connection with persons per se. In abstract legal theory, which we shall come to later on, these "persons per se" become abstracted into "pure" categories of will. But it is private law thinking which sustains the greater sense of the

concrete, precisely because, as Pashukanis remarks, the legal form is here "clothed with the flesh and blood of two contending parties".

Stripped of all its specific determinations, the legal form merges with the "juridical" moment of the exchange act - the "personification" of the commodity. In reality, however, this latter is automatically mediated because this *deus ex machina* necessarily appears as a real person. This mediation posits the substantive character of private law. The legal historian, Maitland, expresses a similar view when he says:

"Sometimes its neighbours will have cause to complain of its legal impersonality. They will have been thinking of it as a responsible right-and-duty-bearing unit, while at the touch of law it becomes a mere many, and a practically, if not theoretically, irresponsible many".

In the actual act of exchange, the individual doesn't merely appear as an exchanger of commodities, but in the concrete form of an individual *per se*,

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1. Maitland, F.W. "Moral Personality and Legal Personality", in *Selected Essays* p. 232. Maitland, however, skirts elegantly round the inelegant compound adjective, viz the right-and-duty-bearing unit, recognising merely that on this phenomenon, "theorising, of course, there has been." p. 234 *ibid.*

even though it is just in the former capacity that he is the equal of his opposite number and hence, the bearer of the legal form. Personality, outside its aspect as the "will" of the commodity within the boundaries of the sphere of exchange, is the essence of human differences - "no two people are alike", runs the common phrase. So it is that "human" differences constantly seek reconciliation with the equivalent form which grows up behind their backs, as it were, which arises independently and between them as possessors of commodities in exchange. Individuality, in the actual business of exchange, appearing here necessarily as concrete individuality along with all the many-sided connections thus implied, inevitably brings with it differences which seek reconciliation with the abstract sameness implicit in exchange and supposed by the legal form. We may say, following Hegel, that the unity of identity and difference here provides the ground of private law.¹

The legal form - here, the abstract legal subject of private law - only arises because and in so far as it can reflect a real equivalence between

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1. Compare Hegel, Logic, pps. 183-198.

1. This is the true sense in which the legal world turns on money. Talk about commercially oriented lawyers, phrases of the kind, "money buys justice" and so forth, are all very well, but none of this distinguishes law in relation to money from that of any other occupation which must compete to make a living. Needless to add, "criticism" of law from this sort of standpoint is quite commonplace. Often self-styled as "critical", "Marxist", "Radical" etc., much of this popular debunking of the legal profession and law must be considered as little more than invective against something which is little understood. Legal theorists and judges themselves, of course, have fared little better with the hidden connections between money and the form of law. Savigny has the distinction of being a legal theorist who displayed at the same time a penetrating insight into the nature of money; for, he says: "In the first place money appears in the function of a mere instrument for measuring the value of individual parts of wealth. As regards this function, money stands on the same basis as other instruments of measurement...But money also appears in a second and higher function, viz. it embraces the value itself which is measured by it, and thus represents the value of all other items of wealth ...(M)oney thus appears to be an abstract means to dissolve all property into mere quantities." *Obligationenrecht*, cited, Mann, *The Legal Aspect of Money*, p.24. Such conclusions as these mark Savigny as one of the most distinguished jurists of modern times. The treatment of money by other, less notable legal figures, is often quite comical. Here, for instance, is a view of the English legal mind in this connection: "I take it that if a tort had been committed in England before England went off the gold standard, the plaintiffs could not say: 'We insist,...on being paid the value of the gold standard pound at the time of the commission of the tort.' A pound in England is a pound whatever its international value." Scrutton L.J., cited in Mann's book, pps. 77-8 *ibid.* *Rule Britannia!*

persons. And that real equivalence is certainly not a matter for the exclusive attention of metaphysics; it inheres neither in a "natural" scheme of things nor in an ether of "pure reason", but in the commensurable form of commodities and money, the things reciprocally alienated and appropriated by their possessors in the relation of exchange. The legal form embodies the equivalence of persons only because and in so far as they are equated with one another specifically as possessors of commodities and the money which circulates them.¹ This, moreover, is the indicium of modern law. Hence, the legal form as abstract personality, unlike, for instance, the legal form of feudal society where every right is dependent upon a particular "status", is common to the mass of people - and it has this distinction precisely because it arises alongside the generalisation throughout society of commodity production, which is, absolutely, production for exchange.

To return to the matter of private law, we have said that the actual personality of the individual is not merely that he is an exchanger of commodities, a "juridical" moment in the exchange act - he is a real person with an occupation, intelligence, character etc. We have said, furthermore, that it is in the

reconciliation which is sought between such factors and the abstract legal form (in its naked connection, its absolutely essential connection, with the "juridical" form of the individual as an exchanger) that the substantive side of private law attains its detailed classificatory content. On the whole, however, the essential strength of the legal form, that is, its inner connection with the "juridical" form, is quite sufficient for the mass of daily contractual exchanges. In this, the legal form subsists in its essential connection as the "juridical" form of the subject in the exchange act. It is precisely this phenomenon which has given rise to the modern stress upon the "customary" basis of law (pioneered by Savigny) and, what is but an inverted reflection of this, notions about the "gapless" quality of modern legal thought (Stammler, Weber). The whole point is that the equivalent form already subsists in the exchange of commodities, the "juridical" form is here implicit, before the legal form articulates itself upon it, before it acknowledges it in its characteristically dislocated modes.

The characteristic dislocation of the legal form in private law, that is, its movement away from its

essential "juridical" connection, comes when this normally adequate basis of formal legal acknowledgement (i.e. where the legal form and the "juridical" form are practically one), is observed in the breach. Such a moment corresponds with the reconciliation which is sought between "concrete" individuality (difference) and the abstract equivalence of individuals (identity) in the exchange relation, whence the form of the legal persona initially springs. The vital point to be grasped here is that the legal form can never eradicate the limits provided by the form of the individual in the exchange relation. The private law development of the legal persona, its most fundamental category which is essentially though not actually the latter (i.e. the form of the individual in the exchange relation, the "juridical" form) can never get beyond it, it is always presupposed. Thus, "concrete" individuality may only be reconciled with the abstract form because and in so far as it is a bearer of it. In other words, if there is no legal persona, there can be no further development of legal relations. In the legal view of things, of course, this is generally recognised simply by

being presupposed.¹ This is the sense in which Pashukanis, quoted earlier, remarks, "Unseen behind every paragraph of systematic advice stands the abstract client...etc." Without the "abstract client",

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1. The law doesn't always recognise this by taking it for granted. Following the practice of legal scholarship, we may give the following example of explicit recognition: In *Newborne v. Sensolid Ltd.* (1954) 1 Q.B.45; (1953) 1 All E.R., a contract was made by "Leopold Newborne Ltd." with the defendants for the supply of certain goods. Subsequent to the sale, the defendants refused to accept delivery of the goods. An action was commenced for damages arising from breach of contract, upon which the plaintiff's solicitors discovered that the company had not been registered at the time of the contract. They therefore took steps to substitute Newborne himself (the promoter of the company) as the plaintiff. He had, however, signed the original contractual letter with the company's name, merely adding his own signature to authenticate it. The defendants argued that they had made the agreement with the company, not with Mr. Newborne, and that since the company had no legal existence at that time, there was no contract; hence, no breach of contract. The action was, accordingly, dismissed. Judges, of course, are not immune from giving contradictory judgements - which makes examples of this kind of dubious scientific merit. Generally, however, the rule, "no legal persona, no legal relations", is essentially implicit in law; its explicitness not being beyond the reflective capacity of legal thought itself - as the example shows.

however, there could be no "systematic advice", even though from the legal standpoint it is this latter, the detailed classification and so forth which seems all-important. Yet it is clear that it is the abstract persona and the historical connections in which it arises and assumes its social significance are all-important for a full and proper comprehension of the nature of law.

Norms about the "reasonable" behaviour of parties in typically recurrent "fact situations", as Weber would put it, are already put forward for the substantive working-out of private law by virtue of the fact that the form of the individual in the exchange relation necessarily appears as a real person. The potential for intellectual classification and articulation of private law dogma is thus set by the general state of development of commodity production and exchange, since it is this latter which develops socially this form of the individual.

"In the development of legal categories",
Pashukanis wrote,

the capacity to perfect exchange arrangements appears merely as one of the concrete manifestations of the general attribute of legal capacity and capacity to act. Historically, however, it is specifically the/
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the exchange arrangement which furnished the idea of a subject as the abstract bearer of all possible legal claims. It is only under conditions of developed commodity production and exchange that the abstract legal form is generated - that is to say, it is only there that the capacity to have a right in general is distinguished from specific legal claims. It is only the constant transfer of rights taking place in the market which creates the idea of an immobile bearer of those rights. In the market the obligee is himself obligated at the same time: he is ceasing every moment to be in the position of the party demandant, and is becoming a party obligated. The possibility of being abstracted from the specific differences between subjects of rights and of bringing them within a single generic concept is thus created.

Private law doctrine is really a proto-type of the entire modern legal edifice, as Pashukanis says. Private law thinking, and especially that major branch of it which is known as contract, displays in a relatively clear fashion its inner connections with the equivalent form of persons in their aspect as exchangers of commodities, since here the legal form is considered directly in relation to the sphere of exchange, out of which it first arises. It is, for this very reason, no accident that private law has developed its various ideas and patterns of systematic advice in the most coherent or, rather,

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1. Pashukanis, Theory of Law etc., p.167.
(Allgemeine Rechtslehre, p.96).

least contradictory fashion as compared with other branches of modern legal thinking; and for this reason, as Pashukanis puts it, "it is precisely in the field of private law relationships that the most solid kernel of juristic haziness..is to be found". However, the equivalent form provides not merely the legal form as private law, but, of course, the legal form as such i.e. in all its guises.

In the varieties of "public" legal thought, in abstract legal theory, the self-same subject of the exchange act who appeared as the persona of private law now appears as an abstract Ego accentuated in a "public" aspect. By the same token in which the private figure becomes public in private law (i.e. as law), the public figure, the state, becomes private in legal theorising thereupon. In abstract legal theory the "public" sphere is conceived under the form of a subject just as in private law, the "private" sphere was conceived under a "public", that is, shared or common form. Not surprisingly then, in abstract legal theory, we find again and again the "public" sphere considered as a matter of will, precisely because it is considered under a form which is equally "private".

Before we move on, it is useful to recapitulate the following three points:

Firstly, the legal form has been taken, first and foremost, in its least mystified connection; namely, as it arises directly from the form of the individual in the exchange of commodities, as the most immediate and formal acknowledgement of the "juridical" moment implicit in the exchange of equivalents. We may, with guarded qualification, conceive of this simple legal form as appearing at the moment when the "juridical" form in the exchange of equivalents is acknowledged by a competent authority outside the direct process of exchange.

Secondly, and herein lies the important qualification, this legal form immediately appears to be something present in all societies where production for exchange has been developed with some degree of sophistication. Consequently, as we shall see, some of the most historically conscientious observers are led to the belief that the form of bourgeois law is historically universal. But this belief arises merely from the commodity-connection, that is, the fact that older societies also had

production for exchange. This commodity-connection we shall have a chance to discuss further in part 3. Here we may just note that the commodity-form cannot be torn from its ground, cannot be divorced from the productive relations which produce it in its full social significance. Just as the generalised form of right is not to be considered as right in general; nor are generalised commodity relations to be conflicted with commodity relations in general. The ancient Phoenicians were a great trading people, they had developed production for exchange and, indeed, certain legal forms appropriate to this ancient development of productive forces under slavery. But that is all; in ancient Phoenician law the modern legal form is not even "there" in a rudimentary and stunted capacity since the modern form supposes a society based on capital and free wage labour. Hence, even the ancient forms appropriate to commodity exchange can, by no stretch of the imagination, be connected with bourgeois law. In earlier societies commodity-legal forms in any case only existed alongside and in combination with other more dominant modes of legal regulation. Only in modern bourgeois society is the equivalent form

embodied in commodity exchange the dominant indicium of law, because only here is society completely dominated by a mode of production geared towards production for exchange on an ever increasing scale. It is only with reference to specifically modern society, therefore, that we may speak alone of the equivalent form of commodities in connection with the form of law.

Thirdly, as the form of law, the form of the individual as an exchanger of commodities is the dominant relation behind all modern legal discourse, notwithstanding its abstract and scholarly guises. The principal connection between the naked legal form and the dispersion which it achieves over a massive empirical terrain, we have said, is one of "dislocation", that is, a process in which the essential form of equivalence is more or less shifted from view depending upon the subject matter through which it is mediated. Some of the "classical" highways and byways upon which this process of mediation has travelled (and attained hundreds of years of mileage) we shall come to in part II.

But first, there are some rather important questions, which have so far been left begging, to be dealt with now.

(2) The private/public dualism within the
legal form

The principal source of the confusion in modern legal thinking which accentuates one-sidedly first the "private" aspect of the legal form and then, in another breath, its "public" aspect, is that the legal form is, at the same time, both "private" and "public". In private law, we have seen, the isolated private individual appears as the bearer of the legal form, which, however, as law, must be also "public". In this process it is possible to conceive: a private bearer of a public right, a private bearer of a private right, a public bearer of a private right and a public bearer of a public right. With its characteristic lack of dialectic, modern legal thinking has inevitably failed to disentangle itself from this mess. Each one of these statements is true, yet at the same time false, or rather, if it is permissible to speak in this way, each one is a quarter true, three-quarters false. For, the whole truth, if the turn of phrase may again be forgiven, is that in this process we must observe a public/private bearer of a public/private right. The public/private description here cancels itself out,

and we are back to the original question of simply the "subject of a right". And what we have here is none other than the form of "abstract individuality" regarding the inner character of which legal thought always draws a blank. For the same reason, then, the public/private dualism remains a riddle which is never solved. The problem of the "public" and the "private" becomes here a development of the basic problem of the "subject of a right" - in bourgeois society.¹

However, there is a great deal more to the problem of the "public" and the "private" than we have so far been prepared to admit. The private aspect of law, for instance, is so-called because its aim is the reconciliation of private interests. But, of course, as law, this form of reconciliation is something over and above the ordered anarchy of exchange, something more than the mere "juridical" moment of the exchange act. In a word, it inhabits a domain of power. And here its "public" character becomes something quite different from its equivalent form.

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1. Chs. 1, 2, ante.

The foundation-stone of private law is the pure right-bearing unit, the persona, in which the "private" and the "public" are entirely merged into one and the same thing. The legal form here stands (almost) undifferentiated from the "juridical" moment of the exchange act. What is "public" here is the shared equivalent form and what is "private" is the isolated individual who is subsumed, as such, under this form. In this, the public/private duality returns, just like the riddle of the general "subject of a right", to the inner nature of the exchange act and the various relations supposed therein. The "public" here transpires in the social production relations congealed in the commodities which those apparently isolated and independent private individuals, requiring solely the will to exchange them, bring to market. These are the suppositions we have made so far. Now, however, there are new avenues to be opened up, and the reason comes in this: the legal form would have no *raison d'être* were it to be simply considered as the "juridical" moment of exchange. The important distinction, which we have so far merely supposed here is that the legal form, as distinct from its subsistence level in the exchange

structure, occupies the domain of power. Even in its closest exchange connection, in private law, the legal form acquires the power to regulate exchange relations when their normally adequate "juridical" basis breaks down. The legal form and power: an equivalent form and its opposite, a relation of domination and subordination. It is here that the public/private dualism of the legal form becomes transformed into the dualism of state and law. The first dualism, of equality and individuality, we have already considered. The latter is a dualism of an altogether different order, for it contains the former dualism (which is united in the legal form as such) juxtaposed with something else, namely, state power.

Before we begin to explain this, the following may be helpful:¹

First Antithesis:

This concerns the legal form as such, i.e. as a generalised equivalent form. As an equivalent form it is "in common", shared by "individuals". In this way it figures as a unity of opposites, as "abstract

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1. "Law as a form...exists only in antitheses", Pashukanis, Theory of Law etc., p.119 (A.R., p.30).

individuality": "abstract" because "in common" (public) as against individuality as such (private). It is the same riddle as the "subject of a right" - of bourgeois society.

Second Antithesis:

This concerns legal form juxtaposed with the relation of power. An equivalent form ("abstract individuality") here appears united with yet another opposite: power, a relation of one will over that of another. Equality and inequality. This dualism appears as the antithesis of private law (the archetype of the legal form as such, as an equivalent form) and "public law".

It is the second antithesis which we must now consider. In order to first clear the way a little it is appropriate to exemplify some of the confusions of modern legal thinking upon the matter, i.e. upon the subject of the dualism between "public law" and "private law". In this, we may draw upon the assistance of the legal theorist, Hans Kelsen. Kelsen has a clear grasp of the confusion of others in this connection, but is, himself, incapable of furnishing a solution to the problem. We shall allude to the erroneous character of Kelsen's solution, but for a thorough

criticism of the basis of his views we must wait until we deal with Kant in the next chapter (Kelsen is a "Kantian"). Here is an example of Kelsen's clear grasp of the problem as it appears in "traditional legal theory":

The contrast assumed by traditional legal theory between public and private law clearly displays the fundamental dualism that dominates modern legal science and thereby our entire social thinking: the dualism between state and law. If traditional theory of law and state opposes the state to the law as an entity different from the law, and at the same time asserts that the state is a legal being, they accomplish this by comprehending the state as a subject of obligations and rights, that is, as a legal person, and at the same time attributing to it an existence independent of the legal order.

Private-law theory originally assumed that the legal personality of the individual logically and temporally precedes the legal order; in the same way the public-law theory assumes that the state, as a collective unit and subject of willing and acting, exists independent of, and even preceding, the law. According to this theory the state fulfills its historic mission by creating the law, "its" law, the legal order, and submits itself to it afterward, which means the state imposes obligations and confers rights upon itself by means of its own law. Thus, the state, as a meta-legal being, as a kind of macro-anthropos or social organism, is presupposed by the law - and at the same time, as a subject of the law, i.e., as subjected to it, obligated and authorised by it, presupposes the law. This is the doctrine of the two sides and self-obligation of the state which manages to maintain itself with unequalled tenacity despite the manifest contradictions which it implies.

1. Kelsen, "The Pure Theory of Law", p.284-5. We shall consider "traditional legal theory" in its more profound modern-classical connections in part II. Kelsen never says who he means in this respect.

Kelsen, however, never discloses the source of this tenacious dualism; in fact, he denies that it exists - after having spoken with such authority upon the matter. It follows, then, that Kelsen doesn't really "criticise" here at all, but rather "ignores". In a similar kind of way, the French legal theorist, Duguit, "criticised" the doctrines of Jhering and Jellinek, which subjected the state to its "own" law (in the sense which Kelsen makes clear above), and ended up with theoretically the same results as Kelsen, namely, that the "true" theory is based upon "will".¹ But let us consider Kelsen's position a little further.

Kelsen is quite correct to summarise the position of "traditional legal theory" in the following manner:

According to the majority view we are confronted here with a classification of legal relationships: private law represents a relationship between coordinated, legally equal-ranking subjects; public law, a relationship between a super- and a subordinated subject, that is, between subjects of whom one has a higher legal value as compared with that of the other. The typical public-law relationship is that between state (or government) and subject (in German, characteristically, Untertan). Private-law relationships are called simply "legal relationships" in the narrower sense of the term, to/

1. cf. L. Duguit, "Theory of Law Anterior to the State", Modern Legal Philosophy Series, Vol. VII. Kelsen is not as naive as Duguit and does not draw this conclusion in so many words.

to juxtapose to them the public-law relationships as "power relationships" or relationships of "domination". In general, the differentiation between private and public law tends to assume the meaning of a difference between law and a non-legal, or at least a half-legal, power, and, particularly, between law and state.

Instead of being so alarmed at the implications of the "majority view" here, Kelsen would have done better to have probed it a little further, since, for once, the majority view is, superficially at any rate, correct. In other words, this traditional view concerning the private/public law dualism has the sense of the legal form as a form of equality which, as such, stands in an antithetical relation vis a vis state power, the latter, supposing as it does, the form of inequality, of hierarchy, domination and subjection. Kelsen's "solution" to the problem here is essentially the "solution" of all positivists to all difficult questions; he ignores it, declaring in the process its metaphysical connections. Anything a positivist cannot solve is "metaphysical".

According to Kelsen, "A closer analysis... discloses that we are confronted here with a differentiation between law-creating facts."² What appeared as

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1. Kelsen, "Pure Theory of Law", p.281.
2. *ibid.*

an absolute dichotomy now appears as a mere "differentiation between law-creating facts." in other words, the antithesis in the "majority view" is ignored and the problem supposedly resolved by simply contradicting it, by uncritically supposing that the term "law" must equally apply to the business of the state. Thus, "the legal plus-value assigned to the state",¹ Kelsen's phrase, is a sleight-of-hand which ignores, with that use of the little word, "legal", the whole issue which is at stake, namely, the "majority view" doubts as to a legal value at all in connection with the state, let alone a "plus-value".

Kelsen's way of saying that he prefers to ignore the problem of the absolute public/private dualism, rather than furnish a "closer analysis" is as follows: "the Pure Theory of Law 'relativises' the contrast between private and public law, changes it from an extra-systematic difference, that is, a difference between law and non-law or between law and state, to an intra-systematic one." And, not satisfied with just this, he adds: "The Pure Theory proves to be a true science (sic) by dissolving the ideology (classical liberalism - S.M.) connected

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1. ibid.

with the absolutising of the difference in question."¹
To "relativise" the dichotomy is tantamount to ignoring it, denying its existence. For ordinary common sense, let alone a "true science", mere existence is rarely the question, but rather, the connection in which a given thing has existence. In so far as "traditional legal theory" has been constantly thwarted with the apparently insurmountable public/private dualism of law, it is certainly not something of its own choosing. Accordingly the most unscientific approach imaginable is one which calmly declares that the problem is a red herring, that the dichotomy does not exist. Of course it exists, and if "traditional legal theory" has ceaselessly wrestled with the problem and inevitably become entangled in a net of typical contradictions, then the overbearing character of this "existence" is patently obvious and, clearly, there is some objective connection concealed behind it. The denial of "existence" is tantamount to foreclosing analysis before it can even begin.

"Traditional legal theory" has not erred in its recognition of the public/private dualism in law. In so far as it has noted that the legal form is a

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1. ibid., p.282.

relation of equality, it has also noted correctly that, as such, it is irreconcilable with state power, which entails in its barest essentials the relation of domination and subordination. Where it has erred, however, is in its mode of reconciling these opposites, something which it has been compelled to do in order to accomodate what is "obvious" in reality, that law is power. As we have already noted, we shall come to "traditional legal theory" proper in part II; but before we do this we must make an attempt to get at the roots of this dualism of law and state, or, what is the same essential thing, of private law and "public law".

In the purely empirical sense it is "obvious" that the state's demands, appearing in the form of statutory rules and so forth, are law. Still, contrary to the positivist view of things, the word "obvious" here has its right to inverted commas, just as the apples observed by Newton "obviously" fell to the ground. For, it is not on account of their issuing from the "political" sphere that the various "public" demands attain the form of legality. On the contrary, such demands, in so far as they do not bear the stamp of private interests, are utterly antithetical to the legal form. The real basis upon which these "public" demands appear as law is their

laboured and cumbersome translation into a vocabulary which is furnished both logically and historically by private law doctrine. This is precisely what "traditional legal theory" has reflected in the dualism of "public law" and private law. Conceptually and historically the legal form (private law) is the prius into which the demands of the "political" sphere find their way.

On the other hand, without supposing a "political" structure in and through which the demands of society as a whole may (well or ill) be expressed, the legal form, as a language of equality which arises on the basis of generalised commodity ownership, cannot be spoken with any authority; it cannot serve any purpose unless it becomes compromised as part and parcel of that structure, unless the logic of private interest is prepared to subsume also (contradictorily) the social interest. Without the "political" sphere the legal form falls back to its subsistence level as a powerless articulation of the equivalent form implicit in the system of generalised commodity ownership. With the "political" sphere, on the other hand, it is compromised and can no longer remain true to form.

It is a matter for detailed empirical investigation to see how a given subject-matter of "public policy", or rather, a demand having no direct private interest behind it, becomes accomodated under the legal form which is basically antithetical to any interest which cannot be construed as a private interest: for instance, the area of state contracts with the private sector of industry, where the state has to be contradictorily subsumed under the private law form of contract. It is the same contradiction in principle here manifest as a specific technical legal attempt to reconcile the power of the state with the form of legality which figured more abstractly and in purer form in the classical attempts to devise a social contract theory of the state. So far as this present work is concerned we shall only be concerned with the general conditions of this contradictory process and therefore the historically pure manifestations of it, namely, in the classical formulations of the social contract. The presence of the same essential contradictory elements in such things as the modern-day legal working out of state contracts with the private sector is something which will not be considered within the confines of this present work.

But whatever the specific character of the state's demands at any given time and in any given "policy area" may be, this much, in general, is always true: so long as such demands have their origin in bourgeois society, they will never dissolve the legal form, the language of private interests in and through which they appear as law. This is because the legal form is essentially a commodity relation, i.e. a relation of private property. On the other hand, this does not mean that the legal form cannot be hideously compromised in the most blatantly obvious manner in the light of the specific character of the state's demands. Indeed, the contradiction between the legal form and the state's demands, the opposition of a language of equality and a relation of power seeking accommodation therein; this is precisely what becomes increasingly apparent and what is naturally to be expected in the very process of modern legal development. The material basis of this is the increasingly antithetical relation of socially organised production (the root of the increasing mass of state regulations etc.) and private ownership of the means of production (whence the form of legality, mediated, of course, through the form of generalised private ownership of commodities which arises upon this basis.).

The legal form and state power appear as opposites which need one another: the latter so that demands in which it is dressed might be given the form of legality, and the former so that it doesn't dissolve and revert back to its primordial existence in the anarchy of generalised commodity relations. But this opposition is a process, or rather, this opposition describes what is materially a deeper underlying antithetical process, which, with the development of bourgeois society comes increasingly to the forefront. The material substratum of the opposition of law and state, of private law and "public law", of the form of legality and the "social" demands which are mediated through the "political" sphere, is the antithesis of private property (the ground of the legal form) and the general development of the productive forces of society (reflected in the increasingly preponderant "interference" of the state). It is this which belies the "socialism" of the modern state, the "mixed economy", and the increasingly mountainous growth of "public law" to the extent that it appears to dwarf the relatively simple and uncomplicated body of private law doctrine into insignificance.

The antithesis of "public law" and private law does not go away with the increased significance of the former. It becomes, in fact, more acute. This

is so because the ground of this antithesis is that between social production and private property, which becomes more acute as capitalism develops the concentration of the means of production into fewer and fewer hands. As the means of production become concentrated into fewer and fewer private hands - as in the modern multi-national corporation, for example - the contradiction of social production and private property becomes more and more acute. As the large-scale modern enterprise becomes more grandiose, as it becomes "responsible" for tens of thousands of jobs, for the production and distribution of products upon which sometimes the effective material stability of the entire social edifice depends, when production in this way becomes effectively social production, then its ownership and control on the basis and in the interests of private proprietorship becomes increasingly obvious as an irrational integument which no longer corresponds with the social responsibilities which it has brought upon itself. The parallel of this in the legal sphere is that the form of legality embodied in private law (which has its roots in private ownership) becomes an increasingly irrational shell in which the growing manifold of the state's activities seek legal expression. Let us just clarify this process a little further.

Social production, i.e. production for the needs of society as a whole cannot be guaranteed on the basis of private ownership of the means of production. One man with the means of production as his private property will use that property as such, as his own and in his own best interests. His interests are private, not social. Once these means of production no longer serve his own purposes, he will discard them regardless of their necessity for social production as a whole. The tale of the nationalisation of industries in modern bourgeois societies corresponds with precisely this principle: the private proprietors lose interest in their railways, their mines etc. as soon as they become unprofitable and they do this quite regardless of fact that such things are absolutely essential for social production as a whole (which here means, for capitalist production as a whole). When essential industries and services become unworkable in private hands (notwithstanding the fact that what is "essential" in this connection appears as a result of "political" manoeuvring) the state moves in and thereby guarantees the continuation of capitalist social production as a whole. In practice this has meant the state not

only taking over for example such things as railways, roads, mines, education and health services and so forth, but has meant the development alongside this of an enormous state bureaucracy responsible for the financial and administrative organisation of such things.

It is not our aim here to go into any detail in regard of these developments of the modern state. Our aim is rather to point out that, with the growth of state regulation in an increasingly large number of areas of social life, law appears to become predominantly "public law". Yet, at the same time the form of legality is still perfectly embodied in private law. The modern legal form is essentially a commodity-relation, that is, a relation of private property in its form as property in exchange. The legal form, as we have already made clear previously, makes no distinction between private ownership of commodities and private ownership of productive means (the basis of the generalised character of the former and hence the legal form itself). Legally, the modern corporative giant, as a private owner of productive means capable of producing the most astonishing

quantities of value, is of the same essential character as one of the hundreds of thousands who work within it. Consequently, so far as the state is compelled to "interfere" with this giant, to remind this essentially private character of his public responsibilities e.g., to those whom it employs, or to the environment etc., so far as the state does these things in specific regard of taming this egoistic giant, it points explicitly to the narrowness of a legal form which implicitly stands on a principle of equality (of giants and dwarfs) on such matters. Just as private ownership of productive means becomes a constraint upon the social development of production (egoistic disregard of jobs, environment etc.), so the legal form becomes a constraint upon the state's attempts to rectify this imbalance. For, the legal form is basically only "generally" concerned in so far as it reflects the generality of private interests.

(3) "Public law": the legal form and state power

(a) So long as there exist, historically, the elements of generalised commodity production and exchange, automatically a system of private-law relations, legal relations as such, become articulated hand in hand with its development. The aim, however, in developing these relations as legal relations, of articulating the already implicit norms of equivalent exchange, supposes an authority "independent" of this process capable of applying those norms to cases in which they appear to have broken down for one reason or another. In other words, the legal form only develops as such i.e. beyond its existence as merely the "juridical" moment of the exchange relation, when, at the same time, there is in existence a form of power that it can join forces with - otherwise there would be no point in developing the legal form as such. For without any power to guarantee the norms of equivalent exchange, that system of exchange might just as well be left to its own devices. The legal form in this latter instance would exist as nothing more than the "juridical" moment of the exchange relation. In this way the

legal form supposes the existence of an authority independent of itself. We can designate this authority with the term, "state".

On the other hand, this "state", under the conditions of generalised commodity production, finds at hand, so to speak, a definite legal form ready and waiting to give in return for accomodation, the blessing of its categories to its (the state's) various orders. The character of the modern state cannot be guaged from these general conditions as regards its specific coloration, but whatever orders it might come up with, the legal form, in return for its shelter under the auspices of power, will readily ornament them with its language of equality. Thus the demands of state attain their legal character.

It is precisely in this way that the commonly-held belief that, it is specifically its existence as law which commands obedience to a given rule, attains its force of conviction. In fact nothing could be more wrong, for the legal form in essence has no "power of command" whatsoever. As an equivalent form, the legal form becomes compromised as soon as it appears (as it must) in conjunction with the organised system of state power. This is the

case even when the legal form is "truest" to its real inner nature as the "juridical" moment of the commodity exchange relation, i.e. in private law, whereupon the legal form acquires the backing of state power in the regulation of exchange relations through private actions. Still, the "power of command" subsists not in law itself but in the given manifold of political conditions that are spoken through the law.

When Austin formulated à la Hobbes (but with none of Hobbes scientific instinct) all law as command by a sovereign, he was really talking about anything but law as such. Austin's theory is specifically a theory of "not" law: the "province" which he "determined" was an official summary of the political conditions which the state stands for - "public law", the demands of the state ornamented in legal style.¹

The legal form as such, private law, which reflects the interests of the individual in the relation of commodity exchange, guarantees in effect

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1. "...juristische Stilisierung" - is Pashukanis' phrase, Allgemeine Rechtslehre, p.145(a). We shall consider his position in this connection later on. Austin's theory is contained in his book, "The Province of Jurisprudence Determined", a book despised by contemporary Scottish writers, like Hastie, for its "commonplace hedonism".

no more than that which is guaranteed in the "normal" business of exchange. And this amounts to very little indeed when it is considered that the "normal" business of exchange, especially in the modern era, has meant the most tremendous of social upheavals: colonialism, competition for markets, trade wars, unemployment, armed conflict on a world-scale ... In all this the legal form is a paper tiger without an "independent" authority behind it. This, moreover, is why jurists, in so far as they speak properly as jurists, can never really talk about "order", as it is called, even though the terms "law" and "order" are commonly associated. The legal form has nothing to do with order. Order/disorder are outside the scope of the legal form, which is strictly a descendent of the commodity-exchange relation.

The legal form is basically a form of equivalence and, as such, is the antithesis of the most elementary facet of power: the domination of one will over that of another. Thus, strange to relate, the *differentia specifica* which makes a thing legal is that of a form which knows nothing of power. Power requires that the will of one predominates over that of another - inequality.

However, the legal form's *raison d'être* as firstly (logically and historically) the systematic working-out of the norms implicit in generalised commodity exchange must be something beyond this alone. That is to say, it supposes a "power" capable of ensuring those norms which, generally speaking, already ensure themselves in the majority of cases. Independently of the legal development of the exchange relation, of the "abstract individual", the "subject of a right" and so forth, we know that the material equivalent form of commodities of itself enables the "do ut des", "do ut facias", "facio ut des" etc., in a word, the "juridical" moment of the exchange act. The point here is that the purpose of making these conditions legally explicit must suppose something else if such a project is not to be an exercise merely for its own sake: in other words, a "power" is supposed which is both "independent" of it and at the same time necessary to it in so far as it is to realise itself (contradictorily) as such i.e. as law.

To express the point here in a sentence: the legal form is not a power in itself, but necessarily makes its way to a centre of power in order to survive.

Materially it is the movement of private property (the commodity-form) under the protection of the state.

Historically, the modern legal form found in the ancient regime, or rather, in the decaying ancient regime, a power structure appropriate to its minimal life-demands. In this way the legal form, essentially a language of equality, an articulation of the social equivalent form of generalised commodity relations, moves under the auspices of a sphere which it is not, a sphere which bears a form antithetical to its own (the legal form's) nature, a sphere which bears the form of inequality: the "power of command". In this historical movement, the legal form became merged into the modern state apparatus as part and parcel of it, as part of the very process of stripping the institutions of the ancient regime of their feudal integument. So established, the new state acquires in the same breath the new language of law and the "power of command" now speaks contradictorily through the language of equality. If men are equal, how can some command others? An absolutely impossible question for previous societies is here turned into a live issue in the so-called "rule of law".

The "rule of law", a veritable contradictio in adjecto, is really rule expressed in the language of law. Law as such i.e. the legal form, cannot "rule" for it is basically an equivalent form. If equality rules, then no one will preponderates over that of another, in other words, nobody rules; but if a power is required to enforce such a maxim, by that very design the maxim is destroyed, for one will at least must then predominate. And if one is reminded here of the "possibility" of a "will of equality", as causa sui, then the reader must also be reminded of how far Kant got with it and the reasons for his demise.¹

The riddle of the "rule of law", that is, rule through the language of equality is to be decyphered thus: the legal form and "power" are opposed to one another, they are antithetical; but, for its very existence, the legal form must move into the domain of "power", it must inhabit the latter otherwise it would perish, or rather, it would revert back to its level of subsistence as the "juridical" moment within the structure of generalised commodity exchange.

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1. cf. part II.

Unlike the snail, the legal form is not born with its roof on its back; in its pure unadulterated state it is an equivalent form estranged from the trappings of power. Its natural course, however, is to move towards the latter. We may picture the process here as a struggle for survival. The legal form and "power", being antithetical, must nevertheless go historically hand in hand. Thus, in the course of its development, the bourgeois state emerges hand in hand with the legal form. The legal form becomes in this respect snail-like, it appears inseparable from the shelter of power which it comes to inhabit.

Were the legal form to move from its shell of power, it would dissolve or, what is the same thing, it would revert back to its essence, its level of subsistence as the "juridical" moment of the commodity exchange relation. On the other hand, as the demands of the state move progressively against the language of equality - it is a question of degree here, depending upon specific historical circumstances - the legal veneer correspondingly peels away.

(b) The state therefore never dissolves the legal form, because and so far as it never dissolves the private ownership of the means of production

upon which basis the antithesis of law and the state is premised. On the other hand, history has shown that the bourgeois state apparatus, under certain conditions, can make this legal form along with its developments of equal right and so forth, look a terrible joke. The example of "Nazi law", which students of jurisprudence are well enjoined to consider is a case in point¹. To make the position quite clear regarding the antithesis and unity of state power and the legal form, this example may appropriately be developed here. It may be developed with the following question: "Is Nazi law really law?"

A negative answer to this question must be qualified with something to the effect: "...in the same way that prescriptions originating in the bourgeois state apparatus generally, regardless of its political coloration, are not law." But the qualifications cannot stop here. This qualified negative answer is still not a full answer, for, in itself, it does not distinguish from the dichotomy of "traditional legal theory", merely that law is private law and that which issues from the organs of state, in so far as it cannot be subsumed under

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1. Fuller in his "Morality of Law" raises the issue of "Nazi law", but gets nowhere near to grasping it. According to him it is purely a technical-legal question having to do with the absence of certain "rules".

the strict categories of private law, is something else, nothing to do with law. What "traditional legal theory", essentially the classic liberal view, cannot grasp is the unity of the antithesis. All which is seen here is the antithesis alone and the state as a "necessary evil".

Nazi law is not law, in the same way that the prescriptions of the bourgeois state apparatus, regardless of its specific political coloration, in general are not law. This answer is fine - but only as a beginning. Nazi law takes on the form of law because the latter, if it is to survive, must be parasitic upon the power structure which it finds available. It is a matter of survival that the legal form inhabits the domain of power, that it unites with it. It is inherently a contradictory process, and overtly so in the case of Germany under the third Reich. It is still nevertheless a contradictory process under "normal" parliamentary democratic conditions (under liberal democracy - the legal form's ideal, as it were) where the antithesis between state power and the legal principle of equality which it bears upon its breast doesn't seem so glaringly obvious. The specific political conditions upon which the legal form is always parasitic - notwithstanding the "bravery" of judges

and the legal profession, a quality which, for this very reason, they are not noted for - are not something which the language of equality can decide, for, try as it may, the legal form cannot go against the grain of its own inherent struggle for survival, a struggle which automatically seeks shelter under the umbrella of power, independently of the latter's specific form. Contrary, then, to the traditional legal view of the antithesis, the Nuremberg laws appear as law not as some awful anomaly, but as part and parcel of the very process which the legal form itself depends upon: power, regardless of its form, to speak its language of equality. Quite apart from the criminal law, this is the real process of the "protection of private property".

"Traditional legal theory" (we shall come to a proper development of this phrase in part II) found in the private law form of contract its ideal, a form in which independent and equal individual wills could be brought together without any apparent coercion on either side. And with this it proceeded to subsume the state itself under this very form, it tried to reconcile the antithesis by reducing public law to private law, by considering power

under a form of equality. The legal theorist, Radbruch, expressed the position here thus:

To liberalism, private law is the heart of all law, with public law as a narrow protective frame laid around private law... This relative rank, as between private and public law, which is assumed by liberalism is expressed in the ideas of the social contract doctrine. It involves "a compromise between private law and public law," (von Ranke) the attempt to trace super- and subordination in the state to an agreement between originally coequal individuals, i.e., to dissolve public law fictitiously in private law. Liberalism carried to the extreme, namely, anarchy, seeks to dissolve public law in private law not only fictitiously but really. By refusing to recognise any obligation that is not self-obligation, it makes the social contract doctrine not only the political theory but also the principle of organisation of social living together.

In the next chapter we shall consider in detail some of the historically more important formulations of this kind of doctrine. Here attention may be drawn to certain of Radbruch's words: "Liberalism carried to the extreme, namely, anarchy...refusing to recognise any obligation that is not self-obligation", i.e. refusing to come to terms with power, indeed, incapable of reconciling the antithesis it holds in relation to the legal form. Let us reiterate what is wrong with this view. It is not grasped by Radbruch,

1. G. Radbruch, Legal Philosophy, p.153., 20th century legal philosophy series, Vol. IV.

who says: "Contractual obligation is not suitable to serve as the basis of the obligation of the law; quite the contrary, it presupposes the obligation of the law."¹ This merely looks at the reverse side of the coin and stresses the other end of the antithesis. Bacon's dictum, "Jus privatum sub tutela juris publici latet"²; an article of the Weimar constitution, "In economic intercourse, freedom of contract shall prevail in accordance with the laws"³ - this is the sort of evidence Radbruch brings in support of his view that private law cannot be the basis of law, i.e. the form of law. In other words, his proof is by assertion. Law "obviously" requires power, therefore it cannot be an equivalent form. Thus, the basis of law is power. Again, recalling the brief points we made in connection with legal theorists Kelsen and Duguit, this is not a criticism of the liberal view, or, what is the same thing, the view of "traditional legal theory".

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1. Radbruch, *ibid.* p.168.
2. "Private law latently subsists under the tutelage of public law". *ibid.* p. 152.
3. *ibid.* p. 172. It is Article 152 of the Reich constitution of 1919.

Regarding the liberal view: the legal form, par excellence private law, is not alien to the power structure of the bourgeois state in the subjective sense, that it "despises" it. In the classical liberal view of the state as a "necessary evil", the "evil" here is the rhetoric of the "free trader vulgaris". The important thing is the "necessary", namely, the fact that the power of the bourgeois state, whatever its "political" character, is necessary to the legal form as such, as an equivalent form. Thus, to return to our example, if "Nazi law" is not law, the latter is parasitic upon the living conditions provided by the Fascist state in so far as it is to retain the platform upon which to speak its language of equality, i.e. its "commodity" language - the language of private property.

Thus, it is very important to distinguish from the view of the law/state dualism which is really a glorification of trade and money-making via "contract" as law properly so-called, via the "harmony" ("anarchy", in Radbruch's terms - it is the same thing) of equivalent commodity-exchange relations, to distinguish from this the real operation of dualism. If the legal form as a relation of equality is antithetical to "power", that is, to

the relation of domination and subordination, then in reality, in bourgeois society, where these forms come alive as it were, they become united in opposition. Each needs the other: the bourgeois state needs its language of equality and the legal form needs power. In the nineteenth century and the early part of the twentieth, the liberal free traders, both in England and on the continent, spoke directly the sentiments of the legal form. They were all for equality and free trade and against state intervention. They sought to realise practically what the legal form stood for theoretically. In their various performances they demonstrated precisely the opposite of their case: to speak the language of freedom and equality, they stalked the corridors of power. As spokesmen for the legal form, i.e. private property, they showed exactly how it must subsist in reality: as a language of equality spoken within the bourgeois state apparatus. If these spokesmen had been theoretically correct, then there would have been no need for them to jockey for parliamentary seats, to move into influential committees and so forth; they would have just as well given their exclusive attention to their various business interests.¹

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1. cf. Finer S.E., in "Studies in the Growth of 19th century Government". More generally, cf. Halevy, "The Growth of Philosophic Radicalism".

Private law is, to use the words of Pashukanis, "the prototype of the legal form in general." But even here, where the legal form appears relatively undisguised in its essential connections with the "juridical" form of the commodity relation, it is no longer true to this latter form. That is to say, as private law it is already "touched" with an alien spirit of super- and subordination in the "power" which it supposes in its business of rectifying private (primarily contractual) relations. Accordingly, the antithesis of law and state is classically formulated very early on in bourgeois society, i.e. before the state even begins to "interfere" with things hitherto operated under exclusively private hands. As we have said, we shall look at "traditional legal theory" proper in this connection in part II. Here we may just remark that legal thought subsequent to the turn of the eighteenth century, whether "traditionalist" or "positivist", has not got beyond these classical formulations of the antithesis of law and state power. Basically, the persistent error here is of the following nature: the antithesis of law and state power (which we have called the second antithesis of law) becomes a mere sublimation of

the abstract subject (the first antithesis of law, i.e. the equalisation of individuals as "abstract individuality"). The state, in other words, becomes subsumed under the legal form as such, whereupon this style of thinking becomes an expression (as distinct from an understanding) of the antithesis of law and state power. For, this is precisely the contradictory process, namely, that of shunting the state's demands, or more formally, the relation of domination and subordination, into a form which intrinsically opposes such a relation, which the second antithesis consists in.¹

1. Legal thinking, since Kant, has done none other than express this antithesis of law and state. Disregarding the legal positivists, who simply declare that a problem doesn't really exist here, this is true of even the most historically conscious juristic writers, e.g. Savigny, Puchta, Ahrens, Friedlander (cf. post, part 3). The English writers who fall into this latter category, e.g. Maine, Pollock, Maitland, Dicey express the law/state dualism with great naivety: Dicey, for instance, believed that the growth of "public law" was identical with the growth of socialism (which could not possibly be legal) and denounced almost every act of state intervention over and above Mill's principle that, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection." Dicey rages against the "collectivist" developments of his day: the Old Age Pensions Act, the Trade Disputes Act, the Education (provision of meals) Act, the Mines Regulation Act. This "rapid growth of collectivism..(demonstrates how) the main current of legislative opinion..has run vehemently towards collectivism." - Dicey, Law and Public Opinion etc., Introduction (2nd. ed.).

(c) We have a duty to acknowledge the work of the legal theorist, or rather, theorist of law, E.B. Pashukanis, in connection with the things we have just considered. At the same time there are some points which may be further clarified.

Firstly: the two antitheses in the process of modern law. In the presentation of these antitheses, the first comes first, and the second develops out of it. They are not logically separate; on the contrary, each logically supposes the other. To clarify: the first antithesis is the legal form as an equivalent form - concretely, as private law, the persona and so forth. Here it is developed first and foremost as an opposition of equality and individuality. Thus the process as described in the introductory remarks in chapter I, not forgetting its material elements as laid out in the whole of chapter two. However, this process so-described, although it temporarily leaves out of view the question of power, on no account precludes it logically. On the contrary, the legal form here supposes that as such, i.e. as an equivalent form primarily, it stands in an antithetical position vis-a-vis the relation of power. The second

antithesis is therefore a development which springs directly from the first, with the difference that the question of power and the legal form is now directly posed: How is the antithetical power relation which is supposed both logically and historically by the very nature of the legal form to be reconciled with it? All the difficulties here turn on the word, "reconcile". For, the antithesis is real, a historical product, and not simply an invention of legal theory. Thus, thinking the thing out does not involve a "reconciliation" so much as a grasping of the thing as an antithesis, as a contradictory unity in reality. We shall come back to this. Let us bring Pashukanis into the picture.

Pashukanis does not talk about the "two antitheses" in so many words. They are nevertheless both present in the way he grasps the process of modern law - indeed, they have to be, for, as we have just remarked, to consider the first, the legal form as such, as fundamentally an equivalent form, automatically posits the second, its antithetical relation with power as it appears in reality. Pashukanis' essay embodies this dialectic:

It is perfectly manifest that the logic of juristic concepts corresponds with the social relations of a commodity-producing society, and that it is specifically in these relations, and not in the permission of the authorities, that the root of the system of private law ("the prototype of the legal form in general") must be sought. On the other hand, it is only in part that the logic of the relationships of authority and subordination fits into the system of juristic concepts - wherefore the juristic understanding of the state can never become a theory, but will always appear as an ideological perversion of the facts.

Problems concerning the "two antitheses" are quite naturally brought together in this statement. In the first sentence, the commodity-connection of the legal form is recalled: the riddle of the equivalent form and its material basis. Essentially, the first antithesis. But, at the same time, the second antithesis is expressly supposed in this first sentence, with the words, "not in the permission of the authorities". These words mean; not as a concession on the part of the state; the basis of law, as fundamentally an equivalent form, is opposed to the relationships of state power. This latter is certainly not unimportant, quite the reverse, but the basis of the legal form must first be sought elsewhere. The second sentence then passes directly to a range of problems posed by the second antithesis.

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1. Pashukanis, Theory of Law etc., p.149.
(A.R., p.72).

Just as the first antithesis supposes the second, so the second embodies the first. Juxtaposed with the problem of the state, in its most elementary facet as a relationship of domination, the legal form does not become something else; it remains, as it was comprehended in the first antithesis, as an equivalent form, only here it undergoes a further development. Here, in Pashukanis second sentence, the legal form remains in reality an equivalent form, a verity proved by the fact that when the attempt is made to shunt the relationships of domination and subordination into it, real contradictions arise: "wherefore the juristic understanding of the state can never become a theory."

The proof of the immoveable reality of the law/power antithesis (so long as bourgeois society remains) is the confusion of legal thought on the matter. The point is reiterated by Pashukanis, quite simply, when he says, after giving a few examples (e.g. "...a community of Jesuits, where all members blindly and unprotestingly fulfill the will of the leader" - notwithstanding that "blindly" might not express the subjective view of the Jesuit):

One need only ponder such examples thoughtfully to conclude that the more systematic the development of the principle of authoritarian regulation (which excludes the notion of separate autonomous wills) the less ground there is for the category law. This is felt with particular keenness in the sphere of so-called public law. Here legal theory comes up with the most serious difficulties.¹

And again, illustrating the "field for endless controversies and of the most impossible confusion":

Law is at the same time a form of external authoritarian regulation in one aspect, while in the other it is a form of subjective private autonomy. In the one case, that which is basic and essential is the index of unconditional obligation and coercion from without; in the other the index of freedom, guaranteed and acknowledged within certain boundaries. Law comes forth at one time as a principle of social organisation, and at another time as a means for individuals "to be disunited, being in society". In the one case law, it seems, completely merges with external authority. In the other case, law sets itself in opposition to every sort of external authority which likewise does not recognise it...²

There is no escaping the dualism of law and power; it is a real historical condition arising directly from the fact that law subsists basically as an equivalent form. The only theoretical "escape" from this dualism is to grasp it as a dualism in reality. Pashukanis never loses sight of this. As this dualism inevitably manifests itself as the

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1. Pashukanis, *ibid.*, p.154. (A.R., p.78).
2. *ibid.*, p.150. (A.R., p.73).

dichotomy of private law (law as such) and "public law", Pashukanis takes the example of Goichbarg, who, like certain other legal theorists whom we mentioned earlier in this same connection, pretends that the dualism does not exist, or, what is the same thing, that it can be thought away. Pashukanis says:

Goichbarg's objections rest on the idea that the abstractions aforesaid (public law and private law) are not the fruit of historical development but have simply been excogitated by jurists. In the meantime, it is this very antithesis which most typically and specially characterises the legal form as such. The division of law into public law and private law typifies this form both from the logical and from the historical standpoint. Having declared that this antithesis simply does not exist, we are in no way lifted above the "backward" (Goichbarg's term - S.M.) practical jurists - on the contrary, we shall be constrained to use the very same formal and scholastic definitions as those with which they operate.¹

The antithesis between "public law" and private law is an antithesis in reality which is not shifted one inch by declaring that it does not exist. What Pashukanis states here is perfectly correct: such declarations, in so far as they are "reasoned", can only covertly return to the definition of law as an equivalent form. They thus move in a circle and end up with essentially the self-same antithesis which

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1. *ibid.*, p.157-8. (A.R., p.82). Goichbarg says: "The division of law into public law and private law, which has never turned out happily for the jurists, enjoys recognition at the present time only among the most backward jurists..", cited, *ibid.*

they initially sought to remove. Pashukanis adds:

The very concept of public law may thus be developed only in this, its movement, in which it is constantly pushing away from private law as it were, seeking to define itself as the antithesis of private law, and then returning once more to private law as to its centre of gravity.

In this way the most articulate of legal formalists, par excellence those who hark back to Kant, end up on the doorstep of the very antithesis which they try to escape from. The truth of the matter is that the antithesis is fundamentally immoveable, so long as the conditions behind it, in a word, bourgeois commodity production and exchange, remain. Bourgeois society is the condition of the antithesis between private and social interests. As Pashukanis says: "the real premise for this overcoming of the legal form and legal ideology is a condition of society wherein an end has been put to the very contradiction between the individual interest and the social interest."²

Secondly, attention must be drawn towards some of the problems which arise while comprehending the antithesis between public and private law as something rooted in the real conditions of capitalist production

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1. ibid.

2. ibid., p.156. (A.R., p.81).

and exchange. These particular problems arise from the tendency to infer the actual conditions of the antithesis from the general logic of these conditions. This tendency is a result of the fact that it is specifically the form of law which is under consideration, and the state, even when it becomes directly involved (in the second antithesis), is still only considered formally, as an official summary of "social" or "public" demands entailing the formal relation of domination and subordination. Pashukanis illustrates this tendency himself. On one occasion he notes, for example, that "'Legal' demands issuing out of the organs of public authority, demands having no private interest of any sort behind them, are no more than the facts of political life formulated in legal diction."¹ Again, this recalls the antithesis between "public law" and private law. Those demands issuing from the organs of public authority are "legal" - in inverted commas. Not really law as such, because they are "power" demands, demands merely ornamented in legal style ("juristische Stilisierung"). The surprising thing about this statement, however, is not this, but certain of the words which go in expressing it, namely the "no more

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1. ibid., p.203 fn. (A.R., p.145).

than" in connection with "the facts of political life". These "facts of political life", in their connection here, can constitute no less than the difference between a Fascist dictatorship and a tolerant liberal democracy. Such conditions are not to be underestimated - in any event. Moreover, in the context of the antithesis between power relationships and the legal form, such things are certainly not to be left out of the reckoning. As we remarked earlier, the legal form can only thrive within the "facts of political life". Outside this sphere it perishes and reverts to subsistence level in the commodity-exchange structure; within this sphere, it becomes a "contradiction in reality".

A word about this term, "contradiction in reality", is appropriate here. The antithesis in bourgeois society between power relationships, whatever their particular coloration, and the legal form is always a unity in (actual) reality - even though it is a contradictory one. The "contradiction in reality" is really an expression of the mode in which the thing in question is to be apprehended in thought, whereas reality as such, as it is experienced by the senses, does not, of course, come labelled with nice neat categories telling us about itself. It needs hardly

be said that, were this the case, there would be absolutely no need to think.

So, the law/power antithesis is brought together in reality, but in the only way that an antithesis can be brought together; contradictorily. In reality, therefore, the form of legality is always compromised, sometimes more, sometimes less, depending precisely upon those "facts of political life."

Pashukanis again furnishes us with a rather uneasy expression when he writes, "State authority introduces into the legal structure precision and stability, but does not create the premises of that superstructure; these are rooted in the material, that is to say, in production relationships."¹ There is something not quite right about the expression of the law/state dualism here. Firstly, there is the suggestion that state authority, being distinguished from the legal structure, is somehow independent of production relationships. And secondly, and what is in fact the cause of this suggestion, the whole business of exchange, i.e. the immediate source of the legal form as an equivalent form, and hence the very ground of the dualism, is cut out of the reckoning. Thus, the odd thing about Pashukanis' statement here

1. 2. 3. 4. 5. 6. 7. 8.

1. ibid., p.147. (A.R., p.69).

is that it seeks to express the law/state dualism while at the same time cutting the basis away from under it, namely, the dualism of exchange (the sphere of generalised private interest) and production (the sphere of particular private interest, where the social interest becomes problematic). It is in this latter sphere, in the sphere of production relationships, that the state's activity is directly rooted, whereas the legal form has its roots here indirectly, i.e. mediated through the form of exchange. By missing this very important distinction, Pashukanis is led into turning "state authority" into something apparently independent of the relations of production, whereas just the reverse is true. For, as we saw earlier, it is directly production and the conditions of production under private hands which posits the state's "interfering" activity, the form of its authority, as guarantor of social production as a whole.

It hardly needs be said, given what we have already acknowledged in connection with Pashukanis' work, that the above oversights which we have made use of are not characteristic of the whole. Indeed, Pashukanis rarely loses sight of the law/state

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1. The truth of this statement is nowadays brought home daily in the incessant "political" talk about trade, prices, employment, productivity, wages, profits, balance of payments, inflation etc., in a word, the conditions of material production.

"The specific economic form, in which unpaid surplus-labour is pumped out of the direct producers, determines the relationship of rulers and ruled, as it grows directly out of production itself, and, in turn, reacts upon it as a determining element...It is always the direct relationship of the owners of the conditions of production to the direct producers - a relation always naturally corresponding to a definite stage in the development of the methods of labour and thereby its social productivity - which reveals the innermost secret, the hidden basis of the entire social structure, and with it the political form of the relation of sovereignty and dependence, in short, the corresponding specific form of state. This does not prevent the same economic basis - the same from the standpoint of its main conditions - due to innumerable different empirical circumstances, natural environment, racial relations, external historical influences etc., from showing infinite variations and gradations in appearance, which can be ascertained only by analysis of the empirically given circumstances." - Marx, Capital, Vol. III, p.791-2.

Recent scientific discussion on the nature of the state rightly takes this as a point of departure and views the state as an essentially unmediated relation of the concrete conditions of material production. cf. Hirsch, Elements of a Theory of the Bourgeois State.

antithesis in its essential connections. On the other hand, it is a tendency with the nature of his enterprise, which is a criticism of the theory of law, that the "facts of political life", "state authority", or rather, the theoretical locus of such conceptions, is disturbingly left out of the reckoning.

Finally, we are now in a position to present the schematic outlines of the law/state antithesis. It is to the sphere of production relations, of the direct conditions of material production, which specifically "state" activity corresponds.¹ It is to the sphere of exchange relations, of generalised private interests, to which the form of legality corresponds. The dualism of law and state is therefore fundamentally a dualism of exchange and production. It develops, as we pointed out earlier, as a dualism of private and social interests, the former being generalised in the form of legality, the latter being particularised as a result of their falling within the conditions of private ownership of the means of production. As we saw, it is under these latter circumstances that the state finds it increasingly necessary to compromise the free exercise of private right over property in this particular

connection, a connection in which, moreover, the legal form is intrinsically opposed to distinguishing from private ownership in general, i.e. mere ownership of commodities.

Still, it might be objected that the mediation of the form of legality through the sphere of exchange is, at all events only a mediation; in other words, that the legal form does, ultimately, depend upon material production relationships. The objection is well-made in so far as it draws attention to the fact that the legal form is not just a commodity-relation, but a commodity-relation which is grounded in a productive system of capital and wage-labour. All this is very true: but it doesn't dissolve the antithesis of law and state. It is true that exchange depends upon production. Production is the basis of exchange, not the other way around. And in this way the form of legality ultimately depends upon the same conditions governing the activity of the state. But this does not make the law/state dualism much ado about nothing. On the contrary, when this common ground comes to the surface, when the conditions of material production become revealed as the veritable basis of all things - in times of economic crisis - the dualism of law and state becomes increasingly apparent. This is evident from the example which we

mentioned earlier, the case of legality under the conditions of the third German Reich. Here the acuteness of the economic crisis bursts the antithesis of legality and the state wide open. All notion of equal standards here goes to the wind. The crisis in production calls for "emergency measures", which in this case throws up the ugly form of Nazism. The complacently "bourgeois" form of Weimar legality is essentially smashed to pieces, but remains gibbering its language of equality under the auspices of the Fascist state.¹

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1. The economic roots of Fascism are generally seen by liberal historians as merely one of many "factors" alongside such things as the "uniqueness" of Hitler's personality etc.. But although Hitler was "unique", there was nevertheless a little bit of Hitler in every down-trodden petty bourgeois, every unemployed worker, who could envisage no alternative rescue from the complete and utter ruin brought about by Germany's unfulfilled need for "normal" capital accumulation, for markets, for economic expansion, for "Lebensraum". The secret to the phenomenon which has both appalled and puzzled liberal historians with their eclectic tools of analysis, that the Nazis came to power by parliamentary democratic means, rests in precisely this, namely the conditions of capital accumulation, the conditions of material production appertaining to Germany in particular and the West in general from 1919 onwards. cf. Vajda, M., On Fascism; and Mandel, E., (ed.), Rise of Fascism in Germany.

The reason why the "common ground" of the state's activity on the one side and the form of legality on the other doesn't dissolve their antithesis, is that this "common ground", i.e. production relationships, is in its own very nature the seedbed of antitheses. Production as production is already at odds with exchange before its products ever come to market, because these products bear the hidden markings of labour for which an equivalent has not been given in return. Exchange, on the other hand, as we made clear in chapter two, contains just the opposite thesis.

It is now time to conclude - although the reason is far from being that enough has been said. But in this first part we have at least got at the material elements behind the form of modern legality. Firstly (in chapter 2), the material elements behind the (first) antithesis of individuality as such, as concrete individuality, and equality; that is to say, the material elements of the generalised commodity structure which lie behind the notion of the abstract subject. And secondly (here in chapter 3), the material elements behind the (second) antithesis of this legal equivalent form and state power, namely,

the opposition of private and social interests premised in the opposition of private property in general, i.e. as generalised commodity-ownership, and private property in particular, i.e. in regard of private ownership of the means of production, whereupon the state becomes increasingly compelled (in the interest of capitalist production as a whole) to compromise the narrow shell of egotistical private interest upon which the form of legality is based.

As a foreword in regard of part 2: the antitheses in the process of modern legality are now to be considered in connection with certain of their modern-classical expressions. Now this terrain is, indeed, a considerable distance away from the immediate conjuncture of events (although perhaps not so far away as might be imagined), that is to say, the present social conditions under which the form of legality makes its typically contradictory appearance. On the other hand (and this is the only "excuse" which is offered in the face of this apparently "escapist" subject-matter) the day when an aspiring new generation of "legal" thinkers take it upon themselves to re-think the language of equality may not be too far away in the distant future, in which event the kinds of criticisms which we are about to make will not be entirely in vain.

Part II

Ch. 1. Modern-Classical Connections of the Equivalent Form.

Modern-Classical Connections of the Equivalent
Form

It was explained in the last section how the subject-matter of private law hides from view the abstract form of equivalence upon which it is based. However, the abstract form, although shifted from view, is not so far removed since the subject-matter of private law is largely a matter of contractual relations anyway. Moreover, it was seen that on this account, following Pashukanis, private law thinking achieves its characteristic internal coherence relative to other branches of "positive" legal thought. In the same kind of way it was Pashukanis' view that the classical modern "natural-law" theories achieved their distinguishing marks of clarity and coherence in the form of discursive argument. But the way in which he skirts round the points involved here is interestingly one-sided.

If we leave un-named certain "contractarian" theorists, we can still say a good deal about them. It was perfectly sensible that these theorists should conceive public authority in terms of a contract, for hidden beneath this notion lay the workings of a new mechanism committed to reproducing commodity-exchange

relations on an unprecedented social scale, a mechanism at work before their very eyes - for the first time. It is the era of the ascendancy of capital, the withering of the ancien regime. These theorists were acutely sensitive to the connection between exchange relations and public authority (and no mean feat given the then historical character of the latter), but nevertheless beheld this connection in a state of mystery - they returned to the "state of nature" for the basis of right.

But how far can these theorists go un-named? Rousseau, for instance, didn't see the "state of nature" the same way as Hobbes or Locke, and Kant is different again. Pashukanis merely talks about "natural law doctrine", "the natural-law prejudice" etc. and so appears to make some rather crude brush-strokes over a richly complex history of ideas. He gives the latter its due simply by pointing out its merits vis à vis the vulgarity of modern legal culture. Our procedure now will be to see how far this kind of view takes us.

The "contract" which the social contract theorists arrived at, whatever the variations of form it took from one thinker to the next, has this negative quality:

it was never "properly" connected with the real equivalent form, the material equivalent form of generalised commodity-relations already becoming increasingly apparent in the societies of their day. It was an idealised form, something which couldn't be cleansed of the mysteries of historical "origins". Despite this grey side to their thinking, however, the remarkable quality of their scientific spirit can only glitter next to the developments of more recent legal culture, in which connection, Pashukanis remarks unceremoniously: "The difference between the natural law doctrine and the most recent legal positivism is merely that the former has felt much more clearly the logical association between abstract state authority and the abstract subject"¹, by which latter he means the equivalent form of persons as commodity owners. He goes on: "It (natural law doctrine) took these relationships of a commodity-producing society, wrapped up in mystery as they were, in their necessary connections and so provided a pattern of argumentation of classical clarity, whereas the so-called legal positivism, on the contrary, has no realisation even of its own logical premises."²

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1. Pashukanis, Theory of Law etc., p.190.
(Allgemeine Rechtslehre, p.126).
2. Pashukanis, ibid.

There are two points to be noted from Pashukanis' position as it appears here. The first concerns the general criticism of more recent legal culture and the fact that it "has no realisation even of its own logical premises"; and the second concerns the "mere" difference of this in comparison with so-called "natural-law doctrine". Let us take the first point first; it may be dealt with here very briefly.

It may appear odd that Pashukanis should talk of "recent legal positivism" being unaware "of its own logical premises" when such positivism has been concerned, more than anything else, with the logical systematisation of legal norms, with "pure" concepts, notions and designations of normative structures, legal rules and so forth. Pashukanis' sense, however, is to be brought out rather differently. The premises of which modern legal positivism is unaware are of a historical character. Hence the logical categories of which it shows no knowledge are those which are embodied in historical movement - and to this extent Pashukanis is perfectly correct. The positivist war-cry against "metaphysics" is symptomatic of just this deficiency, because "metaphysics" in earlier legal thinking (i.e. in so-called "natural law doctrine") is precisely the expression of a serious

attempt to come to terms with it. The sheer artlessness of the "Durkheimian" legal positivist, Duguit, is illustrative in this connection. Duguit boldly declares that, "we have to-day (!) eliminated from politics the theories of metaphysics," and that, accordingly, "a statute can no longer be the formulated command of sovereign power," (by which latter he presumably means metaphysical constructions thereof). He then continues in "hard-fact" manner: "A statute is simply the expression of the individual will of the men (sic) who make it." "Men", a plurality, with (it is all very simple) an "individual will". All we have here in fact is a mere reassertion of the problem, abstract individuality, from which the "theories of metaphysics" departed. But Duguit only sees fit to add, "Beyond that we are in the realm of fiction", as if the "individual will" of "men" bore no such resemblance.¹

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1. Duguit, L, Law in the Modern State, p.69 et. seq. For an illustration of his "theory", Duguit tells us: "In France, for example, statute (which for Duguit embodies the concept of law) is the expression of the will of 350 deputies and 200 senators who usually form the majority in the Chamber and in the Senate." - *ibid.* If only Locke, Rousseau, Kant, Hegel etc. had had M. Duguit to open up their eyes to this powerful theory of law. This is typical of the school-boy manner in which positivism "eliminates" metaphysics. As for Duguit being a follower of Durkheim, the latter's "conscience collective" bears little resemblance to the former's re-statement of it in legal style. cf. Durkheim, Division of Labour in Society.

The second point, which is connected with this, concerns the comparative status of so-called "natural law doctrine" with these more recent developments characteristic of modern legal culture. "Natural law doctrine" apprehends the relationships of a commodity-producing society (Pashukanis means a capitalist commodity-producing society) "in their necessary connections." But what does "natural law doctrine" really mean? It might appear that Pashukanis could have Plato and the ancients in mind, or the Thomists and other Christian scholastics of the middle-ages. In fact, he has in mind the bourgeois theorists since the time of Grotius - which is an important point not to miss:

The natural-law school was not only the most brilliant exponent of bourgeois ideology during the epoch when the bourgeoisie, coming forward as a revolutionary class, was formulating its demands openly and systematically: it was also the school which furnished the model of the most profound and distinct understanding of the legal form.

The context in which he speaks of "natural law doctrine", he further clarifies with the following statement:

1. Pashukanis, Theory of Law etc., p. 127 (A.R., p.42).

For bourgeois thinking the framework of commodity production is the eternal and natural framework of every sort of society and it therefore declares that abstract state authority is an appurtenance of society of every sort. The most naive expression of this was by the natural law theorists, who, basing their doctrines concerning authority on the idea of the communion of independent and equal personalities, supposed that they were starting from the principles of human intercourse as such. They were in reality developing in different modes the idea of an authority which binds independent commodity owners as between themselves. This explains the fundamental features of this doctrine which come out perfectly distinctly as early as Grotius. The primary factors in the market are the commodity possessors who partake in exchange; the form of authority appears as something derivative, something secondary and added from without to the commodity possessors already at hand. Accordingly, the natural law theorists regard authority abstractly and rationalistically - and not as a phenomenon emerging historically and therefore associated with the forces in a given society. In the intercourse of commodity owners, the necessity of authoritative constraint arises where peace has broken down, or where a contract is not voluntarily fulfilled, wherefore the natural law doctrine reduces the functions of authority to merely preserving peace, and declares the sole destiny of the state to be an instrumentality of the law. Finally, one commodity owner finds himself in the market by the will of another, and all are such by their common will. For this reason the natural law doctrine produces a state out of a contract of separate and isolated individuals.

We must see how adequate this type-construction of "natural law doctrine" is. Pashukanis at least is convinced that "Here we have the skeleton of the doctrine, and it permits the most diverse specific variants depending on the historical setting, the

political sympathies, and the dialectic powers of the particular author."¹ The independent variables, however, (political sympathies, dialectic powers etc.) are not so easily simplified.

On the one hand we have all the differences which separate Grotius and Hobbes from Rousseau, or those which distinguish Rousseau from Kant or Fichte, not to mention a host of other possible names, and on the other we have the simplification that they all harboured "natural law doctrine" and the specific relations and functions attached thereto.

How this simplification and this manifold of subtlety, genius and rare stupidity may be united in the productions of these modern classical figures, we shall begin to consider in detail shortly. But first a few more words on this "simplification" aspect of the problem.

It seems a rather Stoic picture of the modern history of the analysis of "Political Right" if the "Robinsonades great and small", as Marx might put it, are thus made to drown - even the giants being just submerged under the water along with the

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1. Pashukanis, *ibid.*, p.188-9 (A.R. p.124-5).

dwarfs right at the bottom.¹ On the other hand, if we may simply mention for the moment the names of Locke and Rousseau, the "contractarian" theorists had indeed only sensed the connection of law with an "exchange relation". They sought the basis of right in a contractual equivalent form - and they rightly deviated from the ancients here in specifying this particular form of equivalence, sensing it in its bourgeois "exchange" character.² Yet, giants that

1. "The Stoics lay down that all who are not at the highest degree of wisdom are equally frivolous and vicious, as those who are two inches under water..." - Pascal, "Thoughts", p.114.
2. The equivalent form at the basis of ancient Political Right is thought out altogether differently. "Is there or is there not some one thing in which all citizens must share, if a state is to exist at all?" asked Protagoras. Here, for instance, he gives his more mythical answer: "Zeus therefore, fearing the total destruction of our race, sent Hermes to impart to men the qualities of respect for others and a sense of justice, so as to bring order into our cities and create a bond of friendship and union. Hermes asked Zeus in what manner he was to bestow these gifts on men. 'Shall I distribute them as the arts were distributed - that is, on the principle that one trained doctor suffices for many laymen, and so with other experts? Shall I distribute justice and respect for their fellows in this way, or to all alike?' 'To all', said Zeus. 'Let all have their share. There could never be cities if only a few shared in these virtues, as in the arts. Moreover, you must lay it down as my law that if anyone is incapable of acquiring his share of these two virtues he shall be put to death as a plague to the city'." - Plato, "Protagoras", p.54. We shall have cause to consider the distinction between the "natural equality" of the ancients and that of the bourgeois theorists a little later on.

they were, they nevertheless beheld the contractual character of right in connection with the mysteries of the "state of nature" and society in general (instead of society in particular) and so forth; thus, they remain submerged under water.

The exchange relation of the "contractarian" theorists was haunted with "original" spirits, the contract they arrived at was not grasped as a historical result but as history's point of departure.¹ Subsequent developments after Rousseau, in German idealism, only mystified matters further (while clarifying others). Kant's development of the "state of nature", where the exchange equivalent found its ideal resting place, into an "idea of Pure Reason" only served to obscure the real connections more thoroughly.² Previous developments, before Locke, on the other hand, appear more naive. The important facts of the exchange equivalent, as an authority bringing together independent owners of commodities, are brought out "clearly and distinctly as early as Grotius." And, indeed, Grotius reflects with perfect

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1. "...not arising historically, but posited by nature." - Marx, see infra on Rousseau etc..
2. The Kantian emphasis has in this way achieved an enormous significance as a pillar and final bastion of modern European legal culture. It is thus sufficiently important to warrant separate consideration later on.

precision the new jurisprudence appropriate to bourgeois society - in his case a Holland in commercial ascendancy upon the high seas of world trade. In this connection, it may be added, we find the true origins of modern jurisprudence - not in Babylon, or Greece or even Rome and later medieval times, but in Holland over the turn of the sixteenth century.

But in any of these developments, before Locke or after Rousseau, in the "freedom of the seas" or in the ether of "pure reason", the equivalent form had not been engaged. There is, however, a strange circularity in the conclusion that every last one of them thus adhered to "natural law" doctrine". Pashukanis does them swift justice, which shows itself in the parallel conclusion that none of them had discovered what Marx was ordained to reveal, namely, the class mechanism underlying the bourgeois social equivalent form.

It transpires that it is all rather too obvious that the classical bourgeois theorists hadn't properly engaged the social equivalent form over which they showed such admirable enthusiasm. But although it is trivially true that none of them could find out what Marx could, it is never all-too-obvious why. The result of this is that we are led into

believing the classicals to be on a par with the developments in recent legal culture. Let us explain this. On reflection it is obviously the case, for example, that the "contractual" sentiments of Locke or Rousseau were not quite placed in their appropriate social conditions - less so in Rousseau than in Locke (but leaving aside their "dialectic powers" for the moment). The reason for this, however, is not that they were in some strange way "lesser" men than Marx (which allows any number of vague and base distinctions to hold sway), but that they couldn't have been expected (except by someone rather foolish) to have perceived in full scientific detail the social changes they were immediately caught up with. And what are these social changes? They comprise the quickly eroding ancien regime, a hitherto unrealised expansion of productive forces and, therewith, markets, the growing power of the bourgeoisie, their class alliances alongside threats of civil war and so forth. They are conditions which reflect the nascent character of bourgeois society; and so, the new social order of equality, of private property and "freedom of the individual" is naturally somewhat difficult to see in its fuller developed character: for such a thing did not then exist. This cannot

be said of recent modern legal culture, which merely echoes the old tales of its classical mentors with a complacency they could never have shared.

The classical theorists are not to be treated unjustly just because their epigones (and epigones of these epigones) have been prepared to let almost two hundred years of history escape their attention.

These classical theorists, from Grotius through to Kant, attacked the problem of right and the mysteries of equality with all the scientific spirit they could muster. Their business was genuinely with a science of right, and that they got so far as the "contract", a relation of apparently isolated individuals somehow brought together by their mutual interest, that they made, in other words, a fundamental connection of right with "exchange", shows just how far they had developed this science.¹ Hence the fact that recent legal

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1. The legal historian, Maine, had this to say of the "contract" theorists: "They had observed the fact, already striking in their day, that of the positive rules obeyed by man, the greater part were created by Contract, the lesser by Imperative Law". - Ancient Law, p.324. But for some strange reason Maine does not see fit to enlighten the reader as to the meaning of this distinction. Thus what is not "imperative" about "contract" he does not say. Regardless of this, however, he felt the pompous need to point out that, "they (the Contract theorists) were ignorant (sic) or careless (sic) of the historical relation of these two constituents of jurisprudence." - *ibid.*

thought has not really got any further than these classical luminaries, and has continued to merely parrot in the dullest of ways the same difficulties with which they were faced, is inclined to lead us to over hasty conclusions about the scientific achievements embodied in the classical formulations of right, or "natural" equality and so forth.

Pashukanis is nevertheless perfectly within his rights to say of natural equality and the classical modern thinkers who re-thought the matter, that they hadn't got it right. He says:

In all other relationships, human inequality - inequality of sex, inequality of class, and so on - is so glaringly conspicuous as history stretches before us that we can only marvel, not at the wealth of arguments that its various opponents could advance against the doctrine of natural equality of human beings, but at the fact that down to Marx, and independently of Marx, no one concerned himself with the problem of the historical causes which contributed to the rise of this natural-law prejudice. For if over the ages human thought has so stubbornly returned to the thesis that people are equal and has worked it out in a thousand and one modes, it is clear that there must be some¹ objective relationship concealed behind it.

On the other hand, those who harboured "this natural-law prejudice" were, to the extent they sheltered it, keeping out at sea precisely to the same extent the

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1. Pashukanis, Theory of Law and Marxism, p.195 (Allgemeine Rechtslehre, p.134).

objective causes behind it. And, for this reason, just the converse of Pashukanis' position might be asserted, namely, that down to Marx and independently of Marx, every single one of those modern classical thinkers of "natural-law prejudice" had been concerned with, and had contributed towards the revealing of, the latter's "objective" basis. It is not just a question, for instance, of Locke having seen less than Rousseau in regard of "natural right" etc., but, on this admission, a question of Rousseau having revealed more than Locke. Whatever the case may be (and we shall come to such details shortly - for they are important), it is clear that in Pashukanis' own terms he is more than overexaggerating when he declares: "...down to Marx, and independently of Marx, no one concerned himself with the historical causes which contributed to the rise of this natural-law prejudice". For this is precisely what the classical thinkers of "natural-law prejudice" were concerned to derive as best they possibly could.

Part II

Ch. 2. The "Contract" and the "State of Nature"

... Summary: "Natural" Sympathies.

The "Contract" and the "State of Nature".

The "contract" is really the private-law contract of a capitalist commodity-producing society. But it is more than this. It is the specifically legal form enmeshed within a configuration of problems about its "origins"; the problem of the "state of nature" and the further questions which this poses, man's position therein and, conversely, his development through society, the role of culture, industry and so forth. The solution is the "social contract". It appears in the classical writers not as a historical result of their own particular society, but as something which terminates the "state of nature" and begins the dawn of civilisation. Thus the specifically legal form is displaced and articulated within a strange system of philosophic reasoning at the centre of which lie this "contract" and the "state of nature". Thus also, the "natural-law prejudice". But we have a duty to see how this sort of thing came about if we are not to forget the names of Grotius, Hobbes, Locke, Rousseau - not to mention Kant, Hegel, St. Simon ... (Marx?).

How great was Rousseau's "natural-law prejudice"? This is a question around which the issues at stake may be developed. Let us see why.

Professor Habermas informs us that Hegel must have possessed a deep fear of the French Revolution, a fear which outwardly manifested itself in the glowing enthusiasm with which he was inclined depict it from time to time.¹ Be that as it may, Hegel was certainly scornful of the ideas which, he believed, announced it:

The distinction...between what is merely in common, and what is truly universal, is strikingly expressed by Rousseau in his famous "Contrat Social", when he says that the laws of a state must spring from a universal will (volonte general), but need not on that account be the will of all (volonte de tous). Rousseau would have done better service towards a theory of the state, if he had always kept this distinction in sight.²

Rousseau hadn't always managed to stop that which is "merely in common" from becoming the object of his enquiries. For Hegel it was unthinkable that the state should be connected with such a base foundation. The terror, according to Hegel, was just such a perversion.

But what is this thing "in common"? In reality, it is the force which mysteriously brings together those isolated and independent commodity owners ("men") in their mutual interest and benefit - an equivalent.

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1. c.f. Habermas' discussion of Hegel's Jena lectures, in "Theory and Practice".
2. Hegel, Logic, p.253.

form, which expresses itself historically in the juridical form of a contract. However, this contract is, in Rousseau, transposed to the question of the foundation of political right, the "state of nature", the "origins" of society and so forth. Therefore Rousseau doesn't exactly let his thoughts lapse to an object "in common" (the "conscience" of the "all": the equivalent form), but, rather, lets them drift far too far away from it, to the dawning of civil society. In other words, it was in a way to Rousseau's merit that he did not do what Hegel reprimanded him for not doing: for not making the "concept" of the general will the substantial element, for not making it a primaeval, universal will unfolding and realising itself in its historical and many such moments.

Something so important as a "will" shared by individuals in common could hardly be "merely" something in common if it had found its way to the "origins" of civil society. The lofty arrogance which denies this finds its place in classical German Philosophy, where, admittedly, the "irrational" elements of Rousseau's social contract had been perceived, but only because "their" reason (Kant's

"Pure Reason", Hegel's "Idea" etc.) could not err in such a way; that is to say, only because Rousseau's problems had not really been taken up. For Hegel it was a base exercise to reduce "the union of individuals in the state to a contract and therefore to something based on their arbitrary wills, their opinion, and their capriciously given express consent".¹ The point, however, is that the "union of individuals" under the form of a contract is a riddle to be solved before it can be scorned, and Hegel had not solved it, for the contract was anything but a matter of "arbitrary wills" in this connection.

The irrational character of Rousseau's social contract really comes to this: It is the juridical form of contract (a definite historical result) appearing out of place; the rude "abstract individual", a product of the crumbling ancien regime and the rise of industrial capital, appears as the thing-in-common, the condition of an "original" contract at the foundation of society in general - not Rousseau's particular society (Geneva), but all societies. But there is more to Rousseau's contract than meets the eye.

1. Hegel, Philosophy of Right, p.157.

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1. Rousseau, The Social Contract, p.12.
 2. Might could not create right for Rousseau.
"The strongest is never strong enough to be always the master, unless he transforms strength into right", - he says in the "Social Contract", *ibid.*, p.6. "Right", therefore, is always the master. If strength were to be the foundation of right, Rousseau goes on, "As soon as it is possible to disobey with impunity, disobedience is legitimate; and the strongest being always in the right, the only thing that matters is to act so as to become the strongest." - *ibid.* This distinction of Rousseau's between might and right vis à vis Hobbes, Grotius etc. is well known. What is not so well-recognised is the fact that Rousseau, who then of course moves to the idea that "conventions" create right, forgot that Hobbes had also applied the "convention" of the "covenant" to his state of bellum omnium contra omnes. In other words, the distinction force/convention is hot air, like everything else in the "state of nature".

The equivalent form supposed in the juridical notion of the contract appears in Rousseau's social contract as a natural endowment giving each and all the capacity to enter into a contractual arrangement with themselves (for there is no "other") for the purpose of establishing nothing less than the state, law, society itself. It is a strange agreement. But let us leave this for the moment. The "clauses" of the social contract may be reduced to one, says Rousseau: "- the total alienation of each associate, together with all his rights, to the whole community; for, ; in the first place, as each gives himself absolutely, the conditions are the same for all; and, this being so, no one has any interest in making them burdensome to others."¹ Each associate "naturally" does this. The grounds for association, however, are not "force" - that, to Rousseau, entailed a Grotian or a Hobbesian view of man² - but the force of "reason". "Reason", which distinguishes for Rousseau social man, is pursued back to "natural" man, man in the "state of nature".

The general point to be made here, however, is that the equivalent form cannot be decyphered or further distinguished on account of this or that contending view of man's dispositions in the "state

of nature". Whether or not it was by force of the Divine, Rational, brutal or otherwise, the "original compact" could not help but repulse and turn away its inner socio-historical character. Even though, as we shall see, Rousseau made great advances, the equivalent form of the "abstract individual" was hardly given a concrete character when it had still to be thought out (as with Hobbes and Locke) in a pre-social connection.

Rousseau's social contract is something conceivable only under conditions of a hitherto unknown level of commodity production, production of and for exchange and all the relations embodied therein. The contract, a reciprocal relation, an exchange relation bearing an implicit form of equivalence: this in fact turns on the commodity-form of property, property as it is immediately appropriated and alienated, "freely and equally", in the mutual business of exchange. This is not a pre-social question; it is essentially bound up with a specific historical stage in the social development of commodity production, a state in which is realised the production and reproduction of commodity-exchange relations on an increasingly public scale - and, not least within the sphere of

"Political Right", the subject-matter of Rousseau's inquiry.¹ Rousseau had got this far: there is an equivalent form at the basis of right which may be conceived under the form of a contract. But he could never say why this should be so, for he develops this observation in regard of the individual in his "natural" state - precisely the theoretical domain in which the "individual" is stripped of all his social relations, his contractual abilities and the like.

The actual ability of a general "all" (the classical writers were not always so inexact, and often spoke, more concretely, of the "many" in the same connection) to enter into a contractual arrangement is a socio-legal question. Once it is perceived as such, the forcefulness of the notion that a "people" may be subsumed under a "natural" form as equals can also be developed and connected in with this definite social basis. A uniform contractual facility shared by the "all" is the historical result of specifically capitalist social development. The equivalent form which Rousseau

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1. Thus, "The Social Contract, or Principles of Political Right". Rousseau's title is greeted by Vergil: "Foederis aequas, Dicamus leges."

put in the dress of the social contract cannot be anything other than a social relation and, as such, peculiar to a definite social form of equality. It arises, we have said (Part I) from the character of property in exchange, a form reproduced on an ever increasing social scale only under capitalist conditions of production. The equivalent form of commodities or property in exchange brings with it the "abstract individual", a form which the real individual shares in common with all others because and so far as they are bearers of property in exchange. Thus the actual nature of the contractual facility at the hands of each in common lies hidden within the mechanism of generalised commodity production and exchange. The real equivalent form at the bottom of modern "Political Right", far from being an original and natural one, subsists in generalised commodity exchange, which in turn passes down into the mechanism of social production and reproduction of exchange relations.

Rousseau had misplaced his lead on the trail of the social equivalent form. Instead of taking him to the depths of bourgeois society, the form of the contract took him elsewhere, to a pre-social

state of affairs. But we must now look at all this more closely. Few scholars of any note have failed to notice that Rousseau put the preconditions of the social contract outside society, that these conditions have to be oddly construed as subsisting already in the "reason" of individuals all similarly thus compelled so far as they are to relinquish their pre-social condition. On the other hand, few again of these (philosophers, historians etc., great and small) have grasped the source of this disturbing theoretical procedure. Consequently, most have failed to fully appreciate the problem (and the "solution") of Jean-Jaques Rousseau.

Rousseau's social contract was a theoretical "failure". But this "failure" has a right to its inverted commas. Rousseau's social contract was, concludes Louis Althusser, an "admirable 'failure' of an unprecedented theory". The impossibility of the social contract in the way that Rousseau expressed it - namely, as something proscribed in a pre-social state by a distinctly modern legal form - leads Althusser to conclude, most sympathetically, that beyond this and the further contradictions which this leads to, there was only one recourse available to

Rousseau's genius: "...there is still one recourse, but one of a different kind, this time, the transfer of the impossible theoretical solution (the social contract) into the alternative to theory, literature. The admirable 'fictional triumph' of an unprecedented literature: *La Nouvelle Heloise*, *Emile*, the *Confessions*. That they are unprecedented may not be unconnected with the admirable 'failure' of an unprecedented theory: the *Social Contract*."¹ We shall return to Althusser shortly. But amongst certain authorities on Rousseau whom we shall find cause to name, we must bear in mind primarily the finest authority - Rousseau himself.

1. L. Althusser, "Rousseau: The Social Contract", in "Politics and History", p.160. In this essay on Rousseau's Social Contract Althusser, as the text will make clear, gives a clear picture of the important issues in this area. But I take the opportunity here to point out that this cannot be said of Althusser's work in general. It is my opinion that Althusser has earned for himself the title of the "Kant" of Marxism, and when we come to discuss Kant later on in this work (albeit in rather different connection) the full meaning of this will perhaps be clearer. But I mean this only in the sense of Kant-the-defender-of-the-faith, the "epistemological" champion, who made what was "rightful" identical with Pure Reason: "Rightful" Reason. Is Althusser's "political" reason (speaking "epistemologically" of course) anything other than a surreptitious "back to Kant"? It can be no other.
cf. Althusser et al., *Reading Capital*.

In the second Discourse (on the origin of inequality etc.), Rousseau shows us what he thinks of his predecessors (Grotius, Hobbes, Locke) . . . and their regard of the "state of nature":

The philosophers, who have inquired into the foundations of society, have all felt the necessity of going back to a state of nature; but not one of them has got there. Some of them have not hesitated to ascribe to man, in such a state, the idea of just and unjust, without troubling themselves to show that he must be possessed of such an idea, or that it could be of any use to him. Others have spoken of the natural right of every man to keep what belongs to him, without explaining what they meant by "belongs". Others again, beginning by giving the strong authority over the weak, proceed directly to the birth of government, without regard to the time that must have elapsed before the meaning of the words "authority" and "government" could have existed among men.

"Authority", "government", the "idea of justice"
- these things are entirely bound up with the conditions of man's social development. And this, Rousseau recognised, meant the development of human thought and industry (agriculture and metallurgy). How far is this an improvement on the theories of Hobbes and Locke? Hobbes and Locke, it seems, had been less acute on these matters than Rousseau.

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1. Rousseau, "A Discourse on the subject prepared by the Academy of Dijon: What is the Origin of Inequality among Men, and is it Authorised by Natural Law?", p.171.

In Hobbes, the covenant of total alienation appears as a most peculiar application of the contract-form to a state of war; it is a strange contract of insurance which the people somehow take out amongst themselves - against a "nasty, brutish and short" life. Where and how this comes about, Hobbes never really says, and to this extent we may conclude that there is little historical imagination in his "covenant". Perhaps more clearly in Locke we find the dawning of a more historically conscious outlook on the "origins" of right. Here, human labour is brought on to the scene. The fear of death, which was all very well, becomes coupled with the need to protect private property. Man must have not just his person protected, but that which is also his, his property in which his labour has been incorporated as means to life. In this way, Locke turned up connections nearer to the heart of modern right - property, labour. Yet this "labour" of Locke's still doesn't approach anything like the concreteness of Rousseau. Instead of the metallurgy and agriculture which Rousseau talked of in the Social Contract and the second Discourse, Locke merely talked of the "mixing of labour" with the fruits of the earth in a mysterious connection i.e. in the "state of nature", whence the Holy Trinity of life, liberty and estate.

The point is that Rousseau's predecessors had not attended to the distinction between natural and social man very thoroughly. They had moved all-too-quickly to the "state of nature" and back again for the foundations of society, and "...in speaking of the savage, they described social man."¹ Yet precisely the same criticism is to be made of Rousseau that he levels against Hobbes, Locke etc. The difference is one of degree, for although Rousseau's attention is drawn to the futility of looking back to an "original" state of affairs in which "modern" categories (of right, authority, justice etc.) might be found, his own distinction between the "original" and the "modern" bears the same uneasiness. That is to say, although Rousseau is aware of the "natural-law prejudice" as it manifests itself in Hobbes, Locke and others, he is nevertheless himself caught within its clutches. In Rousseau, that which is a specifically bourgeois development, the legal form of contract, still finds its way back to the terminus of the "state of nature" and the point of departure of civilisation.

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1. Rousseau, *ibid.*, p.171.

Accordingly, there is the same problem of the contract and the "state of nature" in Hobbes, Locke and Rousseau, even though in all three it is manifest in differing ways. However, their differing "dialectic powers" (especially Rousseau's, the most advanced) must be revealed fully if the scope of the "natural-law prejudice" (if we may continue with that expression of Pashukanis') and its inner historical and theoretical determinations are to be gauged.

In the nature of the modern-classical problem, there is first the division, "state of nature"/society. With this appears the question of the relation between the two. "Man" passes from a "state of nature" into civil society. He and his fellows mediate this passage. This mediation is thought out in Hobbes, Locke and Rousseau under the form of a contract. So much for the bare elements.

In Hobbes, it is well-known, men in the "state of nature", which is a state of war, suddenly, despairingly, find themselves in agreement: they "covenant, every one with every one". In this they give up all their freedom, not to a sovereign "in exchange" for security etc., but to a sovereign,

period. That is to say, the sovereign is the result of the covenant, not a party to it. Hence, the people have no right to expect anything in exchange from the sovereign - they have not contracted with a sovereign - and, with this, we find the "Hobbesian problem" of absolute power, the question of limitations etc. Again, we may mention in passing, no one fails to notice Hobbes' problem here, yet few have appreciated its precise causes (the historical causes are generally at best put merely in the following sort of way: Hobbes was living during a time of civil war, he was a "timid" man etc.). The source of the contract or covenant in Hobbes is pure mystery: How are independent, belligerent individuals suddenly brought together, what force is at work producing this strange form, this uniform contract of equal donation of life and liberty? The answer for Hobbes is the same one given by Locke and Rousseau (it is only the clauses of their "contracts" which differ): the "reason" of "nature". This, of course, turns on the nature of their reasoning.

We have seen that, according to Rousseau, the state of nature in Hobbes is ill-observed. So also in Locke. "Others have spoken of the natural right

of every man to keep what belongs to him, without explaining what they meant by 'belongs'. Others again, beginning by giving the strong authority over the weak, proceed directly to the birth of government.."

Hobbes and Locke denied the state of nature its non-social character in supposing there the conventions of civil society, and they denied the social character of their objects of inquiry (Right, Authority, Government, Law etc.) their non-natural character in supposing here that they are founded upon a natural basis. Denial. "Denegation", says Althusser, who, moreover, is speaking specifically in connection with Rousseau. A similar "denegation" eats at the root of Rousseau's theoretical "discrepancies", to use another of Althusser's terms.¹ We may take note of Althusser's points here.

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1. "Discrepancy", is the rendering given by Brewster, Althusser's translator, of the French, "déclage". According to this translator: "Its literal meaning is something like the state of being 'staggered' or 'out of step'." note in Althusser, "Rousseau: The Social Contract", p.113. The translator also holds the view that "dislocation" would be a "more mechanical" as distinct from the "more mental metaphor" in this connection.

In the categories of the legal form of contract there are two parties. They exist independently of the act of exchange which brings them together, quite mysteriously, as isolated individuals with mutual interests. But in Rousseau's social contract there are no two independent existences coming together. Here is what Althusser says:

(I)n every contract the two recipient parties exist prior to and externally to the act of the contract. In Rousseau's Social Contract, only the first recipient party conforms to these conditions. The second recipient party, escapes them. It does not exist before the contract. Hence the paradox of the Social Contract is to bring together two recipient parties, one of which exists prior to and externally to the contract, while the other does not, since it is the product of the contract itself, or better: its object, its end.

Rousseau does not escape the theoretical difficulties which he perceives in his predecessors; he reproduces them in another form, a form which betrays a deeper awareness of these difficulties and, with this, a more sophisticated sense of their source. Here again is how Althusser describes Rousseau's difficulties:

The 'peculiarity' of the Social Contract is that it is an exchange agreement concluded between two recipient parties (like any other contract), but one in which the second recipient party does not pre-exist the contract since it is its product/

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1. Althusser, "Rousseau: The Social Contract", p. 129.

product. The 'solution' represented by the contract is thus pre-inscribed in one of the very conditions of the contract, the second recipient party, since this is not pre-existent to the contract. Thus we can observe in Rousseau's own discourse a discrepancy within the elements of the contract: between the theoretical statuses of the first and second recipient parties.

All this is true of Locke and Hobbes, but in Rousseau this "discrepancy" yields up the most revealing limitations. Althusser goes on:

...Rousseau, aware of this discrepancy, cannot but mask it with the very terms he uses when he has to note it: in fact he negates this discrepancy, either by designating the first recipient party by the name of the second (the people), or the second by the name of the first (the individual). Rousseau is lucid, but he can do no other. He cannot renounce this discrepancy...That is why when Rousseau directly encounters this discrepancy, he deals with it by denegation: by calling the first recipient party by the name of the second one, and the second by the name of the first. Denegation is repression.²

This "discrepancy", which in Althusser's "reading"³ develops into different stages of "discrepancies" (Discrepancy I, Discrepancy II etc.) and, finally, to the sheer impossibility of a solution, is a form of repression. It is symptomatic of the repression of the social equivalent form underlying

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1. Althusser, *ibid.*, p.130.
2. *ibid.*, p.131.
3. For the kind of emphasis which Althusser gives to the activity of "reading", see his and E. Balibar's "Reading Capital", Introduction.

bourgeois right, the "abstract individual", the right-bearing unit embodied in the legal form of contract; that is to say, a repression of their concrete inner-connections, with the commodity-form, the mode of production, social classes etc.

The basic fault with Rousseau's social contract is that it is cast in the most inappropriate of moulds, the legal form of contract. The result is that he is led into "designating the first recipient party by the name of the second (the people), or the second by the name of the first (the individual)." This observation of Althusser's is very important. But first a few facts. The "people" is the name of the second party, i.e. the result of a prior convention in which it does not exist as such. Thus, in speaking against Grotius, Rousseau says:

A people, says Grotius, can give itself to a king. Then, according to Grotius, a people is a people before it gives itself. The gift is itself a civil act, and implies public deliberation. It would be better, before examining the act by which a people gives itself to a king, to examine that by which it has become a people; for this act, being necessarily prior to the other, is the true foundation of society.

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1. Rousseau, "The Social Contract", p.11.

Grotius naively presupposes a "people" before it gives itself to a king. But, with equal naivety, Rousseau does the same, except for the difference that with him the "people" is presupposed before it gives itself to itself. In Rousseau, "a people" must "become a people". The result of the act by which "a people..has become a people" is "a people", and the cause thereof, "a people". Tautology. On the other hand, the "people" (as result) is also conditional upon each "individual": "each gives himself to all". But that same "individual" then appears in the result of the act, nay more than this, as "the" result, where the individual "may still obey himself alone, and remain as free as before".¹

In Rousseau, the dual result, people/individual, may arise from a contract between individual and individual, people and people, individual and people, people and individual. What a mess! A people is

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1. ibid., p.12.. From the famous passage where Rousseau presents the "difficulty": "'The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.'" This is the fundamental problem of which the Social Contract provides the solution." - Rousseau, ibid.

realised through individuals coming together; individuals are brought together in so far as they are a people, unanimous etc. This is how silly the legal form of the exchange agreement looks when it is forced into contending with the "principles of political right".

Only in bourgeois society does the "individual" appear at the same time as a "public" figure and, conversely, the "public" symbol as the embodiment of the "individual". Therefore, the people/individual débacle in Rousseau is a definite sublimation of the legal form of contract. For, in the legal form of contract we find the "abstract individual", the public/private figure merged into one as the singular juridical right-bearing unit. It is this which in Rousseau is displaced and pondered under the quaint candle-light of eighteenth century Reason.

We cannot modify the theoretical status of the "natural-law prejudice"; it is the same whether we pass it over as the mysterious commodity-form hidden in one way and another by an outmoded impression of "nature", or whether we look at its more intricate movements e.g. in Rousseau. In other words, the

"natural-law prejudice" is a most finely determined object, and is to be understood as having nothing to do with crude historico-theoretical generalisation despite the fact that on occasion one might find it convenient to talk simply of modern "natural-law dogma" as a more or less naive expression of the new social order of markets, contracts and money.

Rousseau, of all the modern classical natural-law writers, elucidates most symptomatically the theoretical depths to which the contract-form is incapable of reaching. However, it is surely best not to get bogged down in questions about Rousseau's "originality" here. It is important not to get lost in a strange and increasingly irreconcilable "history of ideas" (which all-too greedily turns itself into a scholastic exercise of no consequence, into an object reminiscent of Benda's "Trahison Des Clercs"). Why, indeed, compare Rousseau with Hobbes and Locke - instead of, say, Hobbes with Descartes and Spinoza? Thus, for instance, Spinoza had perceived the theoretical dualism of Hobbes in a way certainly no more reprehensible than Rousseau. On the other hand, it might be added, Rousseau wasn't exactly the spiritual recluse "fearlessly"

1. Spinoza and Rousseau are both compared with Hobbes in the following passage of Leo Strauss' "Natural Right and History" (p.272): "His (Hobbes') notion of the whole required, however, as Spinoza had indicated, that the dualism of the natural world and the world of man, be reduced to the monism of the natural world or that the transition from the state of nature to civil society, or man's revolt against nature, be understood as a natural process. Hobbes had concealed from himself this necessity, partly because he erroneously assumed that presocial man is already a rational being, a being capable of making contracts (instead of "partly", Strauss would have done better to say, "precisely" - but any sound notion of the tyranny of the legal form is understandably alien to this recent natural-lawyer). The transition from the state of nature to civil society therefore coincided for him with the conclusion of the social contract. But Rousseau was forced by his realisation of the necessary implications of Hobbes' premises to conceive of that transition as consisting in, or at least decisively prepared by, a natural process: man's leaving the state of nature, his embarking on the venture of civilisation, is due not to a good or bad use of his freedom or to essential necessity but to mechanical causation or to a series of natural accidents." "Essential necessity", "mechanical causation", "use of freedom", "natural accidents" - Strauss, in other words, finds it difficult to express the way in which Rousseau overcame the discrepancy that he (Rousseau) had noted in Hobbes.

Appropriate references regarding Spinoza's criticism of Hobbes are given by Strauss, *ibid.* But see generally B. de Spinoza, "Ethics, Proved in Geometrical Order" (Everyman). Regarding the Geometry of Hobbes: In 1629, according to Plamenatz, Hobbes, on a visit to the Continent, "discovered and 'fell in love' with geometry, and came to believe that true knowledge in every sphere is to be gained by the method of geometer". - Hobbes, "Leviathan", Introduced by J. Plamenatz, p.3. It is said/

putting geometrically forth his moral objections to Hobbes' fearful geometry¹ and so forth. To get to the point: "comparison", "originality" must not be encouraged entry into the issues at stake here, they cannot in themselves have any theoretical importance. They cannot, because they thrive on the fact that "there is no comparison". As soon as "comparison" begins to take over, everything begins to get mysterious, for the opposing thesis going hand in hand with such a project is that "distinctness", "originality", "genius" etc. are incomparable. Faced with the infinite barrenness of this same/difference opposition (for in itself the distinction brings literally anything into play), it is no accident that the "history of ideas" at its best develops the symptoms of blind obsession for biographic detail spiced with vulgar journalistic intimacy.

Accordingly our purpose rests neither with the "difference" nor the "sameness" of Rousseau's work ("compared" with Hobbes, Locke etc.), but rather with "sameness and difference" taken together, whenever and in so far as there is cause to speak of one or the other. Thus it is to be hoped that within the

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(note 1 cont.)

that Hobbes, at one time believed he had managed to "square the circle", much to his subsequent embarrassment. Theoretically, the impossible squaring of the circle, resembles the equally impossible "squaring" of the legal form of contract with the foundations of society.

foregoing comments neither "sameness" or "difference" is unduly accentuated in connection with the ideas of Rousseau, and that what is "different" in Rousseau expresses at the same time something which is to be found in Hobbes, Locke etc. also, and conversely, what is the "same" is, at the same time, expressed differently - in other words, that the distinction same/different is reduced to indifference and appropriately left behind to cover the void space it is forever doomed to peer into.

Let us illustrate what is meant by this same/difference business another way. If one is stressed, the other is understressed - they must, consequently, be held in mind together. If we make too much of Rousseau's dialectic powers, we forget that they were contained by the "natural-law prejudice"; if we fail to give due regard to his acute powers of observation, we run the risk of overstating the "sameness" within the manifold of natural-law doctrine. Let us, in lieu of a summary, consider in this connection Lucio Colletti's essay: "Rousseau as Critic of 'Civil Society'".¹

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1. In L. Colletti, "From Rousseau to Lenin", p. 143 et. seq.

It is not such a novelty as Colletti makes out that Rousseau had dialectics embedded in his criticisms of civil society.¹ However, the distinctness and acuteness of some of Rousseau's points leads Colletti into wanting to distinguish him "from" the tradition of natural-law thinking. A good deal hangs on this word "from". Rousseau can certainly be distinguished from Hobbes, from Locke, from Grotius; but he can only be distinguished "within" the natural-law tradition. Here we have a case of "difference"

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1. Compare Engels, "Anti-Duhring", p.159-61. A text which Colletti sees fit not to mention in this connection. "Outside philosophy in the restricted sense, the French nevertheless produced masterpieces of dialectic. We need only call to mind Diderot's 'Le Neveu de Rameau' and Rousseau's 'Discourse sur l'origine et les fondements de l'inegalite parmi les hommes'." writes Engels in the Introduction to this work. Apart from the fact that this shows that at least one of the founding-fathers of Marxism (we shall come to the other in the text) was aware of Rousseau's fine critical faculties, there are other reasons why Colletti is displeased with this work of Engels. In this connection compare Colletti's remarks on the development of Marxist philosophy in his Introduction to the Pelican edition of Marx's "Early Writings". The issues are too involved to deal with here.

ignoring "sameness", or, rather, seem to have. We seem to have a case of disproportion. The distinctness and often astonishing penetration of Rousseau's thinking leads Colletti into occasionally putting Rousseau far too far outside the context of the natural-law tradition. In so far as Colletti does this, he must overexaggerate Rousseau's connections elsewhere.

Accordingly, "(o)ne point that is embarrassing and hard to explain in this whole affair", Colletti's affair with Rousseau, "is that in spite of the fact of his debt to Rousseau, Marx never gave any inclination of being remotely aware of it."¹ Without documenting the context of Colletti's statement, there immediately appears a yawning gulf to be bridged over a typically uncertain "history of ideas" here - namely, where a "debt" is unacknowledged by Marx to a thinker who came before Hegel, St. Simon, Fourier (not to mention Feuerbach, Proudhon etc.), and before classical Political Economy (we shall come to this), Smith, Ricardo etc.

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1. Colletti, "Rousseau as Critic..etc.", p.187.

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1. Marx, Grundrisse, p.83. My friend, Neil MacCormick, to whom I owe a great deal in connection with much of this work, takes exception, in particular, to Marx's view of Smith as it is expressed here, namely, that the latter "begins" with the "individual and isolated hunter and fisherman". The basis of the objection is that Smith does not postulate the individual or isolated hunter and fisherman, but rather, "nations of hunters", having their own characteristic social structure. The point is well-made only in so far as one is prepared to ignore the extent to which Smith actually managed to distinguish the characteristic social structure of "nations of hunters" from that of bourgeois nations. Marx's point, of course, is that he didn't manage to do this, that is, not scientifically at any rate, and that, consequently, many of Smith's economic categories have the quality of being applicable to all forms of society, with nothing theoretically preventing this "naturalistic" error.

Here is a quote from Marx's Grundrisse which Colletti makes use of in his argument:

The individual and isolated hunter and fisherman, with whom Smith and Ricardo begin, belongs among the unimaginative conceits of the eighteenth-century Robinsonades, which in no way expresses merely a reaction against over-sophistication and a return to a misunderstood natural life, as cultural historians imagine. (Just) as little (does) Rousseau's contrat social, which brings naturally independent autonomous subjects into relation and connection by contract, rest on such naturalism. This is a semblance, the merely aesthetic semblance, of the Robinsonades great and small. It is, rather, the anticipation of "civil society", in preparation since the sixteenth century and making giant strides forward towards maturity in the eighteenth. In this society of free competition, the individual appears detached from the natural bonds etc. which in earlier historical periods make him the accessory of a definite and limited human conglomerate. Smith and Ricardo still stand with both feet on the shoulders of these eighteenth-century prophets, in whose imaginations this eighteenth-century individual - the product on the one side of the dissolution of the feudal forms of society, on the other side of the new forces of production developed since the sixteenth century - appears as an ideal, whose existence they project into the past. Not as a historic result but as history's point of departure. As the Natural Individual appropriate to their notion of human nature, not arising historically, but posited by nature.¹

The thing which Colletti takes exception to here is the assimilation of Rousseau within this natural-law tradition i.e. that mode of thinking which places the "abstract individual", the historical product of

the social development of commodity production and exchange, in a pre-social connection, in a "natural" state of affairs. According to Colletti, this "rather remarkable passage" of Marx's, which, he rightly observes, "recalls the real historical roots (the development of commodity production and the resulting configuration of all social relations as 'contractual' or 'exchange relations) of the 'independent' individual of eighteenth-century natural-law theory",¹ this passage does Rousseau an injustice. However, what precisely this injustice amounts to Colletti finds difficult to say. For some reason Marx's view of Rousseau is so clearly "conditioned" that "it is a fact that it acted as a retarding factor until Marxists reached the point of being able to re-examine Rousseau's thought."²

In the passage quoted, Marx refers to Rousseau once, merely in passing. He writes (it is so roughly penned down that we need parentheses): "(Just) as little (does) Rousseau's contrat social, which brings naturally independent autonomous subjects into relation and connection by contract, rest on such naturalism." What on earth is wrong with this?

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1. Colletti, "Rousseau as Critic..etc.", p.189.

2. ibid.

Marx was not writing an essay on Rousseau (he begins with Smith and Ricardo - a point we shall come to in a moment). Moreover, just in this tiny sentence Marx does more justice to Rousseau than those who, following Voltaire, believed Rousseau to represent "a reaction against over-sophistication" and a desire to "return to a misunderstood natural life". This naturalism is a "semblance", a peculiar domain in which the contract (the individual in "this" society of free competition etc.) is systematically displaced. Something so displaced is simultaneously something repressed, namely, the significance of exchange, contract, the market, money, commodities etc. in "this" society. Rousseau is not unaware - the bourgeois character of Geneva, politicians who spoke of "nothing but trade and money" (2nd Discourse) - but this is exactly what makes this naturalism more than for anybody else "his" problem. In that one small sentence, Marx's brief mention of Rousseau could not be more supremely appropriate. Colletti's point is therefore quite hollow.

But what are Colletti's reasons for Marx's "conditioned" view of Rousseau, a view which has "acted as a retarding factor"? The "retarding factor" is presumably one which acts to restrict a fuller

appreciation of Rousseau's work. Colletti can only be vague in his essay:

One possible explanation (of Marx's "misinterpretation" of Rousseau - Colletti is following on not from the instance in the Grundrisse, but an equally inappropriate one in Marx's much earlier "On the Jewish Question". See below.) ..could perhaps be found in the interpretation of Rousseau current in Germany at the time when Marx's thought was formed. Hegel, for example, gave the Contract an essentially natural-law interpretation. Rousseau, to him, is a theorist of "atomistic" liberal individualism.

1. ibid., p.188. cf. Marx, "On the Jewish Question", in Early Writings, p.234. Here Marx merely quotes a passage from Rousseau's Social Contract and declares that "Rousseau's description of the abstraction of the political man is a good one". According to Colletti Marx "misrepresents" here "a fundamental passage from the Contract on the 'de-naturalisation' that society must carry out on man to transform him from a mere 'natural' man into a truly 'social' being". ibid. The Rousseau passage is as follows: "Whoever dares to undertake the founding of a people's institutions must feel himself capable of changing, so to speak, human nature, of transforming each individual, who in himself is a complete and solitary whole, into a part of a greater whole from which he somehow receives his life and his being, of substituting a partial and moral existence for physical and independent existence. He must take man's own powers away from him and substitute for them alien ones which he can only use with the assistance of others." Marx doesn't "misrepresent" Rousseau at all by saying that this "description of the abstraction of political man is a good one", nor when he adds after he has quoted it certain vague Feuerbachian conclusions about emancipation of the human world, man becoming a "species-being" in real social life etc. All Marx can "misrepresent" here is his own later, more rigorous views over these latter questions.

With this, Marx's "misrepresentation" of Rousseau is turned into that of Hegel, who saw Rousseau as "a theorist of 'atomistic' liberal individualism" and viewed the Contract as "an essentially natural-law interpretation". Back to Hegel! The terms used here to describe Hegel's view are worth scrutiny: Rousseau is "a theorist of 'atomistic' liberal individualism"; his Contract is "an essentially natural-law interpretation". This is interesting because firstly, it is a true statement of Hegel's view and secondly, it is also a true statement of Marx's view. But it is true of them both for very different reasons. We have just considered Marx's view of Rousseau and the Contract, perfectly contained in the quotation from his Grundrisse. And, we mentioned at the very beginning Hegel's view. So, the point at issue here can be made briefly. Marx connected Rousseau's "'atomistic' liberal individualism", his "essentially natural-law interpretation" or, to return to our previous phrase which we retained from Pashukanis, his "natural-law prejudice", in with the commodity structure of bourgeois society, which furnishes the real answer to his (Rousseau's) problem. Hegel, on the other hand, merely scorned these things in Rousseau because they did not live

up to the logical demands of the speculative Idea. The furthest which Hegel got with the "natural-law prejudice" is finely expressed in his "Philosophy of Right" when he says of those theories of law and of the state that give these a basis in terms of "positive divine right, or contract, custom etc.": "So far as the authority of any existing state has anything to do with (such) reasons (i.e. 'positive divine right', 'contract' etc.), these reasons are culled from the forms of law authoritative within it".¹ But Hegel never actually got beneath those "forms of law" and, in particular, the modern legal form whence the "reasons" he attacks derive. For him this "getting beneath" is not a question of looking at the mechanisms of "this" society, but instead a matter of the "truly universal" surpassing its finitude in e.g. Rousseau's "general will".²

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1. Hegel, *Philosophy of Right*, p.156. This is one of the many instances where Hegel "overreaches" himself in thought, as Marx used to say; where, in other words, Hegel gets the subject-matter critically laid bare in spite of himself i.e. in spite of his idealist deduction of it.
 2. "...if you say 'the will is universal; the will determines itself', the words you use to describe the will presuppose it to be a subject or substratum from the start." Hegel, *ibid.*, p24. Unfortunately, however, not a "subject or substratum" of the Idea.

We need not pursue this particular line of argument any further. On no account does Colletti enhance our appreciation of Rousseau's "originality" by talking on the one hand of Marx's "debt" to Rousseau and on the other, Marx's "misrepresentation" of him (supposedly symptomatic of an unacknowledged "debt"). Rousseau's "originality" if it is to mean anything can never consist in him having surmounted natural-law doctrine, it can only refer to the way in which he made use of it. Not Rousseau as "Marx", but Rousseau as Rousseau. Rousseau as "Marx", is Colletti's way of saying, "Rousseau outside natural-law doctrine". Since the latter is impossible, Colletti's roundabout gestures in the direction of the former are all doomed. Let us take one final example.

In the Marx passage in the Grundrisse, cited earlier, Smith and Ricardo are mentioned in connection with the eighteenth century "individual" - the product of the disintegration of the feudal order and the corresponding social development of commodity production and exchange relations, wherein the individual appears isolated, independent etc. - an "individual" as yet clothed in mystery. However, Smith and Ricardo "still stand with both feet on

the shoulders of the eighteenth-century prophets".¹
The important words here, for our present purposes, are "on the shoulders". They see further than those upon whose philosophical shoulders they stand. Their vision is directed towards the economic basis of society and its inner workings. In this way Rousseau is theoretically "backward" compared with Smith. Colletti doesn't set about assimilating Rousseau to Marx by rejecting this, but, in a roundabout way, by accepting this fact.

So far as Political Economy is concerned, Rousseau was behind Smith and the Physiocrats. The "backward and backward-looking character of Rousseau's economic views is beyond question", says Colletti. He continues: "In a fragment relating to the Social Contract he (Rousseau) even went so far as to state that 'in everything depending upon human industry, it is essential to be able to proscribe every machine and every invention which might shorten labour, reduce the number of workers and produce the same result with less trouble'."² Wherever this "fragment"

1. Marx, op. cit. p.83.

2. Colletti, "Rousseau as Critic..etc.", p.162.

comes from (Colletti doesn't give a reference), it is not unassociated with the following, which appears in the second Discourse: "If he had had an axe, would he have been able with his naked arm to break so large a branch from a tree? If he had had a sling would he have been able to throw a stone with so great velocity? If he had had a ladder, would he have been so nimble in climbing a tree? If he had had a horse, would he have been himself so swift of foot?"¹ In any case, the "fragment", even if it doesn't quite come forward so naively as this, is certainly "backward-looking". In this "fragment" Rousseau is far and away from being a critic of the bourgeois social order, unless, of course, it harbours in some way a disguised sense of the fundamental contradiction of capitalist social development, namely, that the increased productivity of labour which goes hand in hand with the increased application of machinery and equipment does not go to the full benefit of the workers, that in fact, any benefit which does accrue to the latter under such circumstances is only relative to an always proportionally greater benefit

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1. Rousseau, Second Discourse, p.164.

constantly accumulating in the hands of their employers. But nothing of the kind is in Rousseau's mind. And Colletti is quite correct to emphasise that Rousseau is well behind Smith and the Physiocrats on this score, the latter, appreciating as they did the progressive side of capitalist social development, the massive development of productive forces which it ushers forth.¹ But Colletti is quite mistaken if he thinks that this can be turned into a little "theme" connecting Rousseau up with Marx, if he thinks that Rousseau's more "naturalistic" approach can be assimilated to the kind of criticism which

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1. Smith's observations on the progressive aspects of the division of labour which accompanies on an ever increasing scale capitalist social development, were often tempered when he came to consider the lot falling to the labourer in all this. On the other hand, his guileless comparisons with the noble savage, neither factually nor theoretically appropriate, sustained his enthusiasm. Thus: "Compared, indeed, with the more extravagant luxury of the great, his (the labourer's) accomodation must no doubt appear simple and easy; and yet it may be true, perhaps, that the accomodation of a European prince does not always so much exceed that of an industrious and frugal peasant as the accomodation of the latter exceeds that of many an African king, the absolute master of the lives and liberties of ten thousand naked savages." - Wealth of Nations, p.117.

Marx brought to bear on Smith, the Physiocrats, Ricardo etc. He puts it this way: "Rousseau's insensitivity to the phenomenon of 'development' (chez Smith, for example - S.M.) sharpens his dramatic perception of the new 'social inequality' which is emerging and prevents him from seeing the progressive significance of the rise of industrial capitalism and the concomitant rise of bourgeois 'civil society'".¹ What is Colletti leading to? The "progressive significance of the rise of industrial capitalism..etc." means the same as the word "development" (which appears in quotes); so it is a superfluous addition. The sentence can be reduced to: "Rousseau's insensitivity to the phenomenon of 'development' sharpens his dramatic perception of the new 'social inequality' which is emerging." It is this "sharpened dramatic perception" which Marx borrows from Rousseau. What a vague result! Why not borrowed from St. Simon, or Fourier or even Proudhon? Colletti concludes: "Marx, who inherited the analysis of 'economic development' worked out by Smith, and that of 'social inequality' developed

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1. Colletti, "Rousseau as Critic..etc.", p.162.

above all in France, unified and combined these two arguments."¹ The important words here are, "developed above all in France", for it is no longer Rousseau, it is post-revolutionary French Socialism - another matter altogether.

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1. *ibid.* All this conclusion amounts to is an underhand mention of two of the famous and well-known "three historical components of Marxism" - German Philosophy, French Socialism and English Political Economy - it proves nothing of Rousseau as "Marx" or Rousseau outside natural-law protocol and other such one-sided attachments to his "originality". And here the irresistable pun begs due forgiveness:

Marxist Philosophy - Beware of the
'Return' of Jean-Jaques Rousseau!

Summary: "Natural" sympathies.

It would be unnecessary to dwell any further upon the consequences which flow from the specious notion of "originality" going hand in hand with the attempt to turn Rousseau into a thinker outside his time.¹ The fact that Rousseau's inquiries were circumscribed by eighteenth century "naturalism" is ineradicable. Consequently, his "originality", if we must speak of such things, comes within the vicious circle thus described - not outside of it, but in the ingenious attempts to break through it. Of course, the theoretical tools appropriate for the success of these attempts were unavailable to him, but, more than this, they were necessarily beyond his reach. This is precisely why it is most appropriate to concentrate upon Rousseau rather than Hobbes or Locke (both giants in their own right nevertheless), for his development beyond these (that he saw the barrenness of their naturalism etc.) makes him the "freest" of the modern classical

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1. "...in general, one has to acknowledge that it is impossible, even for the greatest and most prophetic mind, to transcend the historical limitations and causes of his own time" says Colletti, p.193 *ibid.* at the end of his essay. This conclusion would have been less feeble had "one" acknowledged it "in particular" instead of "in general".

thinkers and, in this way, the finest illustration of the necessity and inescapability of (modern classical) natural-law dogma. Freedom and necessity here correspond with difference and sameness; terms which we mentioned in a similar connection earlier. Neither side of the opposition can be stressed independently of the other without getting into a muddle, in which connection we notice philosophers (who are supposed to know all about Hegel) making just this sort of mistake. But we have already taken sufficient note of this sort of thing.

It was theoretically impossible for the classical writers to transcend the naturalism within which their endeavours were constrained. Rousseau, our prime example, shows this quite clearly; the freest of the classical minds cannot escape it. We must now say why this apparently well-known fact is so significant, why we have given it so much (but really not enough) attention. A theoretical impossibility: what does this mean? We have already answered this question with the example of Rousseau's difficulties, but let us briefly look again. Rousseau had noticed the defects in the naturalism of Hobbes and Locke. On account of their naturalism, Hobbes and Locke had not found a solution to the problem of right, its foundation and basis etc.

But who else could Rousseau consult, had anyone else advanced the science any further? Where else could Rousseau go? Excepting the final recourse to literature, noted by Althusser, all Rousseau could do was to stay with them, to keep essentially within the naturalist problematic. The attempt to go backwards, as it were, to get the required depth, that is, Rousseau's return to the ancients, could not help him. "I shall suppose myself in the Lyceum of Athens, repeating the lessons of my masters, with Plato and Xenocrates for judges, and the whole human race for audience",¹ he writes in

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1. Rousseau, "A Discourse...etc.", p.162. The connection between Rousseau and the ancients is mentioned neither by Althusser nor Colletti, op. cit. It is well-noted, however, by another Rousseau scholar, Leo Strauss, whom we shall have cause to mention in this connection very shortly. As the latter notes, Rousseau follows Montesquieu in the view that virtue is the principle of democracy, since it is inseparable from equality — a view which was not shared by the ancients. cf. Strauss, "Natural Right and History", p.256; on Montesquieu, cf. Hegel, "Philosophy of Right", p.177 et. seq. This distinction between ancients and moderns is important for the fact that it corresponds with the differing material bases of their respective societies. The "virtue" with which the ancients wrestled ceaselessly had nothing to do with the form of equality which the early bourgeois theorists held in such high esteem, for ancient society was based upon slavery. For this reason, Rousseau's appeal to his "masters" in this respect is all the more obviously a doomed escape route from the overbearing naturalism of his eighteenth century predecessors.

the second Discourse, forgetting that his problem (the origin of inequality, hence also equality), in the terms in which he posed it, would have been utterly inconceivable for those particular judges. Bourgeois equality and its contradictions, the true historical essence of Rousseau's problem, begin to appear only in the eighteenth century - a considerable distance from the problems of virtue, knowledge etc. as they were posed over three hundred years before Christ.

A theoretical impossibility: twist and turn as he may, Rousseau cannot escape its clutches. Definite historical conditions proscribed it: the fact of the dawning of bourgeois civilisation in its most progressive phase, the mere beginnings of the subsumption of all social relations under the form of equivalent exchange. Full-fledged bourgeois right is as yet still immature, still just on the horizon, still weighed down and clouded over with the remains of the ancien regime - still finding its highest scientific expression within the confines of naturalism. Two hundred years after Rousseau it is a gross understatement to say that these conditions no longer obtain. Rousseau's naturalism is completely justified by the conditions of his time,

but even by the turn of the eighteenth century, in the post-Revolutionary era, it can no longer be sustained - not even à la Rousseau. New moves have to be made; Saint-Simon has "great things" to do, as he reputedly had his valet remind him every morning upon waking;¹ and, by the time Marx's discoveries appear on the scene in the latter part of the nineteenth century, bourgeois society is perceived in its fullest and most mature form, and naturalism, having lost all its credibility, is finally and completely surpassed. All this, it may be added, developed quite in keeping with the (necessarily thwarted) scientific spirit of Jean-Jaques Rousseau.

Thus, it transpires how important it is to see clearly the historico-theoretical conditions of classical-modern natural-law. Nothing could be more alien to the spirit of Rousseau than to imitate his problem two hundred years later on. Thus, one "sympathetic" Rousseau scholar, Leo Strauss, incredible though it seems, still shows no notion of the significance of Political Economy, let alone

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1. cf. Henri de Saint-Simon, "Social Organisation, the Science of Man and other writings". The anecdote appears on the first page of Markham's introduction to this edition.

1. cf. Strauss, "Natural Right and History". Naturally, with this glowing and spirited performance Strauss has achieved the desired reputation for "returning" to natural-law. Strauss revives, as Stammler did in the twenties, the late nineteenth century "neo-critical" view of law, which, being of Kantian stamp, contains formally the same sort of naturalist problem which is to be found in Rousseau. It may be noted here that the sort of opposition which Strauss puts up against Weber in the second chapter of his book is not accidental given Weber's generally more acute historical sense and the threat which this equally "neo-critical" scheme poses for any felt need to restore the authority of something which, by definition, we do not know. Whereas the Kantian "thing-in-itself" appears more cautiously in Weber as something which historical inquiry cannot reach, in Strauss it is something which such inquiry emphatically must not reach. The difference is a question of the degree of emphasis placed upon a problem which for both is entirely of their own making. The extent of this difference can be gauged from the hard raps over the knuckles which Weber gave to Stammler in his day - a translation of this polemic by M. Albrow appears in the British Journal of Law and Society (Winter 1975). So far as Strauss is concerned, his position is made abundantly clear (or unclear, depending upon which way we look at it) when he writes: "to understand the problem of natural right, one must start, not from the 'scientific' understanding of political things but from their 'natural' understanding, i.e., from the way in which they present themselves in political life, in action, when they are our business, when we have to make decisions." *ibid.* p.81. Empathy, not science; the mysteries of the "moral" decision rather than the conditions under which it must be turned into a mystery - but, we shall see, there are finer and more historically justified moralists than Leo Strauss to whom we may pay our attention in this connection. Alongside Strauss, compare also Rawls, *A Theory of Justice*; Dabin, *General Theory of Law*, and Stammler, *Theory of Justice*.

the criticism of it, in the understanding of natural right. It is as if Saint-Simon, Fourier, Hegel, Smith, Ricardo, not to mention Marx, had not existed. Strauss, in fact, is almost an imitator of Rousseau. That which was symptomatic in Rousseau of an attempt to get out of natural-law and its contradictory results, is taken up by Strauss in an attempt to return to it. The flight to antiquity in Strauss, however, is supplemented with the Bible.¹

That "natural" sympathies can be sustained two hundred years after Rousseau, can only mean that the mysteries of the contract-form, the legal form, have been systematically sustained also - independently of their scientific disclosure. How has this been possible? After Rousseau, how has such a thing been possible without the glaring theoretical embarrassment that goes hand in hand with it, when the contract, the state of nature and so forth have been so widely and well-recognised for their contradictory nature? The truth of the matter is that the inner character of this naturalism, its historico-theoretical conditions and so on, have not been widely and well-recognised. The pretence to the contrary is in fact a Guileless conceit of

modern legal culture supported, however, by a tremendously important development in the modern history of ideas, a development which finds its purest expression in the philosophy of Kant.¹

After Kant the form of legal culture is fixed by the limits of "pure reason", which, in fact, is nothing much more than a cleverly disguised mode of sustaining those same discrepancies which we observed in the naturalism of Rousseau and his seventeenth and eighteenth century predecessors. But we shall come to illustrate this in detail shortly.

Immediately after Rousseau, the contract-form is elevated by Kant into an idea of pure reason. In philosophy, Kant represents an enormous advance. But, so far as the legal form was concerned, this development represented a step backwards, a further mystification of it, a movement further away from the concrete conditions of capitalist social reproduction directly behind it. In this way, Kant made a backward step under the guise of a forward step, under the cloak of a theoretical advance which supposedly "eradicated" the theoretical discrepancies so "obvious" in Rousseau. Nothing

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1. Symptomatic here is the wide acclaim given to modern writers such as Stammler, Strauss and, in America, Rawls' Theory of Justice. The conditions of their "Kantianism" will be considered in general infra.

could have been a more convenient development than this for the ideological requirements of subsequent legal culture. With the blessing of Reason (pure and unadulterated), the legal form could safely remain a mystery - right up to the present day, and in spite of the fact that this mystery was gradually decyphered in the nineteenth century. Thus, it is no surprise that Kant has become the lodestar of modern legal culture and still remains the highpoint of its reflective capabilities. And for this reason we are obliged to continue our survey of the equivalent form and its modern classical connections with a more detailed observation of the Kantian philosophy and its social connections with the form of right.

Before we do this, it is appropriate to recapitulate in a few words our primary aim in considering these classical connections of the legal equivalent form. It is, first and foremost, the aim of showing conclusively that this equivalent form is, in relation to these classical thinkers and their formulations, the same equivalent form which we revealed in the earlier part of this work as subsisting within the commodity structure of

specifically bourgeois society. In relation to Rousseau and others, whom we have considered in this respect, we have always supposed this to be the case, namely, that the same equivalent form subsists in (obviously) very different ways in the real mechanism of bourgeois society and in the "ideal" discourses which they bequeathed to us. In the case of Rousseau, for example, we have always supposed this to be the case at the same time that we tried to show it. If a little indulgence may be permitted, the results here seem to be immovable: the real equivalent form furnishes the key to Rousseau and his immediate predecessors and, moreover, without doing any injustice to, or performing any vulgar reduction upon, the greatness and unrepeatable quality of their endeavours. For those who, for reasons less worthy than they are wont to admit, are inclined to think otherwise this point must be made clear. We can pay the classical thinkers all the due respect owed to their "originality", "genius" etc. precisely on this account; in other words, we can know and appreciate the depth and significance of the things they knew precisely because we are prepared to engage them with things which they did

not and could not know. As with Rousseau et al., the Kantian development and its connections with the equivalent form may be similarly appreciated, but this, however, takes on a different appearance and historical significance. To this we must now turn.

Part II

Ch. 3. The Theory of Law as Pure Reason

... The Cognitive Faculty. "Rightful"
Cognition and the "Science of Right".
'Comical Niaiserie Allemande".

... Further Considerations.

The Theory of Law as Pure Reason

At the beginning of his "Institutions of Private Law", Karl Renner remarks that the Kantian conception of the legal world "as a lawful order of actions which in general resembles the natural order," is a conception that is "based on a very narrow abstraction derived from a society of private owners connected solely by competition and contract."¹ This is all very well, but Renner omits to explain why precisely this connection is to be accepted. Unwittingly, he furnishes us with the clue to this omission himself.

Kant's definition of right, which Renner also provides, runs as follows: "Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one person can be harmonised in reality with the voluntary actions of every other person, according to a universal law of freedom."² Now it seems quite clear from this that the harmonising "in reality" of "the voluntary actions of any one person...with the voluntary actions of every other person", the actual

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1. Renner, The Institutions of Private Law and their Social Function, p.46.
2. Kant, Philosophy of Law, p.45 (trans. Hastie).

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1. If the treatment of Renner here seems unusually harsh in connection with an apparently minor oversight, it is to be pointed out that Renner's entire work is thoroughly saturated with such oversights. On the point in question, the German original reads: "...dieses Philosophen ist hangriefflich der ideologische Ueberbau der einfachen Warenproduktion."
- p.2, Die Rechtsinstitute des Privatrechts etc. Having thus criticised Kant's definition of law, it is no surprise to discover that Renner proceeds in his enterprise with a definition that is of essentially the same character. "Thus Renner puts at the foundation of his definition of law the concept of an imperative addressed to the individual by society (considered as a person). This artless conceit seems to him a perfectly adequate exploration of the past, present, and future of legal institutions."
- Pashukanis, Theory of Law etc., p.117-8 (A.R., p.28). The definitions of Kant and Renner only appear to be different, but a moment's reflection shows that it is the same riddle of "abstract individuality" which is contained in each.

reality in which the Kantian conviction subsists, is a condition furnished by specifically bourgeois society, where, as in no other previous historical period, each for the first time relates to "all" on an equal legal footing. But this is not at all clear to Renner, for he adds: "It is clear that this kind of philosophical dogma (i.e. Kant's) is the ideological superstructure upon a system of simple commodity production." With this little word "simple", Renner demonstrates that he has not grasped the connection at all. The Romans and, much earlier, the Phoenicians, the ancient Greeks etc. all had systems of simple commodity production, and in none of these cases could each relate to "all" on an equal legal footing and thus provide the "in reality" at the roots of a specifically Kantian "kind of philosophical dogma."¹

The modern legal form (and abstract philosophical expressions thereof) arises not on the basis of mere commodity production, but, specifically, on the basis of capitalist commodity production. Only under conditions of capitalist commodity production do the mass of producers move freely to market, exchange their power to create and augment capital-value in return for a wage, which is in turn divided into

further exchanges in the market for goods and services, and so on; that is to say, only under such conditions do the mass of people (the "all" reflects the rhetorical enthusiasm of the classical thinkers) acquire a common legal personality, provided by this very generalisation of commodity-exchange relations, whereupon it appears, for the first time, that "the voluntary actions of any one person can be harmonised in reality with the voluntary actions of every other."

Kant's definition of law, for all its apparent universality, is quite clearly particular and amounts to little more than an affirmation of a historically definite status quo. On the other hand, Kant's significance does not lie with the fact that he produced an "ideological" definition of law; it doesn't require one of the greatest philosophers of all time to do that. His significance lies in the way in which he arrived at his conclusions; he found for them a basis in pure reason. And, so far as modern critics are prepared to ignore the details of Kant's reasoning here, they ignore at the same time the ultimate theoretical defence of modern legal thought.

Now it might be objected that if Kant's definition of law is false, that is, if his consideration of the form of law sub specie aeterni is self-evidently contradictory (which it is, because the truth of its conditions is provided only in specifically bourgeois society), then the premises behind this result must also be similarly defective, and therefore once the conclusion has been shown to be false, to do the same in regard of the premises is superfluous. Such an objection would be ill-considered, for it is precisely the failure to look into the reasons behind such notions of law which effects the continual repetition of the same mistakes. The history of modern reflective legal thought, since Kant, is the testimony of just this.¹

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1. By reflective legal thought, we are to understand legal thought in its broadest sense, i.e. inclusive of all those fragmented episodes of legal self-reflection in other disciplines that have considered law, to some extent, within their territory. It is in this way that we find cause to consider writers such as Weber, Renner, Maine and so forth under the auspices of reflective legal thought. On the basis of similar connections, Gurvitch considers Weber and Renner, amongst others, as "European founders" of the "Sociology of Law". For no other reason than that it allows him to display the extent of his reading, Gurvitch turns this arbitrary "specialisation" into something which began with the ancients, proceeded through the Middle Ages and arrived fully-fledged on his own doorstep. cf. Gurvitch, G., The Sociology of Law.

In Kant's definition of law we observe that, "the voluntary actions of any one person can be harmonised in reality with the voluntary actions of every other person"; in other words, an equivalent form of persons. This comes about, according to Kant, as a result of a "universal law of freedom", which figures as the solution providing the connecting link of each with all. This "solution" is really just an expression of abstract individuality, the mere form under which apparently isolated individuals are brought together as equals. Of course, the material substratum underlying this form consists in an equal standard that is furnished uniquely by bourgeois conditions of commodity production. But Kant did not ask the question, how does society produce this result? He asked, instead, how does the individual produce it? And his answer, to put it simply, was that the subject found within himself a "faculty" enabling him to realise, in an enlightened fashion, his universal (equal) nature. In the case of law, the faculty reconciling the antithesis of individuality and equality is the faculty of will.

Right, in the Kantian scheme of things, is therefore a question that has to do with the faculty of will. But what does this mean? First of all, it falls within the sphere of what Kant called the Practical Reason. "The Practical Reason," said Hegel, "is understood by Kant to mean a thinking will, i.e. a will that determines itself according to general laws.." But if we are to accept this, we need to know why it is that the will should be so-described, we need to know, in other words, what those "general laws" are. And Hegel goes on to ask, appropriately, "What, then, is to serve as the law which the Practical Reason embraces and obeys, and as the criterion in its act of self-determination?"¹ The basis of the Practical Reason is Pure Reason. Hegel thus adds, "There is no rule at hand but that given by the abstract identity of the understanding."² In other words, if we want to know the reasons why the will is accredited with the quality of self-determinacy (which in Kant becomes the principle of law: thus, "Right, therefore, comprehends the whole of the conditions..(etc.)..according to a universal law of freedom."), we have to consult yet

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1. Hegel, Logic, p.93.

2. ibid.

another Kantian faculty, the faculty that has to do with this "abstract identity of the understanding", namely, the faculty of pure cognition. Right is an idea of Pure Reason. Therefore, to understand the reasoning behind the notion of right as conformable with "a universal law of freedom" we must look at the cognitive faculty which deduces it as such.

Before we do this, it might be wondered why it is necessary to take Kant at his word even this far, for it is evident that he is on the wrong track to begin with in considering the form of law under the auspices of a faculty of will, i.e. a faculty belonging to an individual thinking-subject. This seems to be clear in so far as the form of law does not concern individuality as such, but rather, a definite social form of individuality, one in which, moreover, individuality as such readily becomes its opposite, as something characteristic of the mass of people, whereupon the individual appears as a legal subject and shows thereby that the matter in question is not one of individuality at all but just the opposite. On the other hand, this negation of individuality in the principle of right (as equality) is precisely what Kant managed

to express in terms of individuality as such. He did this by turning individuality as such into individuality with "faculties". Therefore, the proper criticism of Kant is not that he made individuality the basis of law, but that he made individuality in possession of "faculties" the basis of law.

The Cognitive Faculty

The faculty of pure cognition in Kant figures as a mode of reconciling the dualism of the subjective with the objective. With this, it immediately appears that we have the theoretical parallel of the dualism in the practical sphere of law, namely, the dualism of individuality and the equivalent (objective) form of right which finds expression as "abstract individuality". Kant's entire philosophy, as a matter of fact, is played out on the various themes of a basic dualism of the subjective and the objective, and the characteristic solution of this dualism, that the subject finds within himself a "faculty" for coming to terms with the object-world appears in all the principal subject-areas over which Kant casts his net. Thus, in the three principal areas of cognition, will and emotion, the subject finds himself in possession of a "faculty"

of cognition, will and so forth.¹ Kant's philosophy is therefore appropriately called "subjective idealism" and its consequent associations with the theme of "abstract individuality" (subjective idealism means individuality which is abstracted, equalised under the form of a theoretical construct) have made it into a veritable legal world-view.

But we have to answer the question of how the faculty of pure cognition justifies considering the form of law as a matter of will, as a "universal law of freedom", i.e. as self-determinate will. Basically, the faculty of pure cognition enables this because it enables us, in the final reckoning, to say anything we like - and have grounds for it in nothing less than pure reason! The faculty of cognition, in other words, doesn't escape the age-old philosophical sin of relativism (scepticism, agnosticism - "no knowledge").

1. Although Kant wrote many other things besides, his philosophy may be considered as falling into three principal Critiques: of Pure Reason, of Practical Reason, and of Judgement. They correspond with what Kant understood to be the principal faculties of the human soul, respectively: cognition, will and emotion.

The cognitive faculty has this negative character because Kant makes it always conditional upon the activity of a subject-mind alone. Once this is the case, there remains nothing to prevent the Kantian faculty from merely standing in for the following kind of utterance: I know such and such to be true because I have thought it. Of course, the "I" doing the thinking, in Kant, is not any old "I", but specifically an "I" making use of his faculty of synthetic judgement a priori. This, however, doesn't make a great deal of difference. But we have a duty to get a proper sense of this apparent trivialisation of Kant.

Kant asked, how are synthetic judgements a priori possible? He asked, in other words, how do we know things other than through the mere formalities of logical inference (the principle of identity) and the principle of non-contradiction? Really, how is knowledge possible? - since Kant rightly grasped that this was a process of synthesis, quite distinct from merely analytic judgement and involving the connection of contraries. The synthetic judgement means that the given predicate is not already cogitated in the subject. Kant's answer was simply that "we" connect these contraries.

On the other hand, it involved Kant in a most astonishing feat of philosophical profundity to say just this. How are synthetic judgements a priori possible? Kant reduced the connection of contraries implicit in the notion of the synthetic judgement to a question of how "we" connect them, and therefore to a dualism of the thinking-subject on the one hand and the object of cognition on the other. He therefore ruled out at the very outset the possibility that the synthetic unity must be found in the objects of cognition themselves, regardless of how "we" may or may not judge them, because he reconciled the subject/object dualism on the side of the subject alone.

It is not beside the point to illustrate briefly how Kant expounded his subjective process of objective cognition. Clearly this subjective/objective dualism is its dominant feature. Thus, objectively present in all the phenomena of experience are what Kant called the categories of the pure understanding. These latter fall into four principal divisions: of quantity, of quality, of relation, and of

modality.¹ Still, these categories are also subjective - for all their objectiveness. This is so because the condition in which we receive them, even as such, i.e. even as they appear in Kant's theory of pure reason, independently of their presence in a synthetic judgement proper (in mathematics for example), is always sensuous. The categories themselves, therefore, have to be transcendently deduced, that is, deduced by means of our faculty for pure cognition. In other words, the categories have to be deduced by means of a process in which they themselves figure as elements of that process, or, to put it another way, the transcendental deduction of these elements supposes that these elements themselves are arrived at through the process which they seek to define, namely, the process of pure cognition. In Kant,

1. In Kant, the categories of the pure understanding are set out thus: of quantity (unity, plurality, totality); of quality (reality, negation, limitation); of relation (substance and accident, cause and effect, reciprocity); of modality (possibility/impossibility, existence/non-existence, necessity/contingency). cf. Critique of Pure Reason, pp. 60-68.

our faculty for pure cognition must determine itself as it were.¹ And for him this process can only come about as a condition of the pure elements in our sense experience.

Apart from the pure categories of the understanding, the other chief elements in the process of pure cognition are, according to Kant, the pure elements of sense, namely, space and time. But, just as the objective categories of the understanding are nevertheless subjective, so the subjective categories of sense are objective. This subjective/objective dualism is supposed at the outset by Kant to be the essence of pure cognition and it is present throughout the entire journey through the labyrinths of the Critique of Pure Reason. The condition in which we receive all our knowledge of the world is that it comes to us alone through "our" senses. The purest possible elements of our sense experience are, Kant says,

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1. "Kant asked himself: how are synthetic judgements a priori possible? - and what, really, did he answer? 'By means of a faculty'... But is that an answer? An explanation? or is it not rather merely a repetition of the question?" - Nietzsche, Beyond Good and Evil, p.23-4. And Hegel had said, with the same thing in mind, "True, indeed, the forms of thought should be subjected to a scrutiny before they are used: yet what is this scrutiny but ipso facto a cognition?" - Logic, p.71.

space and time. Considering that these elements are ours and ours alone and do not belong in any part to the objects of our cognition, they are subjective; they belong to the thinking-subject and Kant considers them as categories of an Aesthetic. On the other hand, supposing that we do make synthetic judgements a priori, then the pure elements of sense being the condition under which they are necessarily made, must, in the best sense of the word, be objective.

Thus Kant has two sets of categories, the aesthetic categories of sense and the logical categories of the understanding. Using these he develops the principles of pure cognition and Kant believed that with these he had developed the principles at the foundation of all other cognition. But there is no need to go into any further detail. The principles of the pure understanding developed by Kant still bear the marks of the subjective/objective dualism posited at the onset as definitive of the problem of pure cognition; they are therefore, in Kant's terms, general a priori connecting conceptions (connecting subject with object) premised in the pure ideality of space and time (which are subjective and ideal at the same time and hence come forward in this way as the only possible connective).

What did Kant prove with all this? He proved, really, that which he supposed as a condition of him proving it at the outset, namely, that synthetic judgements a priori are possible. A superfluous exercise it would seem, since scientific knowledge wasn't exactly non-existent in Kant's day. Hegel put Kant's achievement in this respect in the following way:

Still, though the categories, such as unity, or cause and effect, are strictly within the province of thought, it by no means follows that they must be ours merely and not also the characteristics of objects. Kant however confines them to a subject-mind, and his philosophy may be styled subjective idealism; for he held that both the form and matter of knowledge are due to the "Ego" or knowing subject, the form to our thought, the matter to our sensations.

If we look at the content only of this subjective idealism, there is indeed nothing to object to. It might at first sight be imagined, that objects would lose their reality, when their unity was transferred to the subject. But neither we nor the objects would have anything to gain by the mere fact that they possessed being. The main point is not, that they are, but what they are, and whether or not their content is true.

By confining the conditions of knowledge of things to a subject, all Kant allowed on the side of the object, the thing known, was the mere condition of its existence. Effectively therefore, Kant had said of any given object of knowledge, that it exists.

1. Hegel, Logic, p.76.

But what seems more astonishing to the modern mind is the fact that Kant claimed for this demonstration the limits to the entire human understanding. For the unfortunate object of cognition, all it can do is exist (on its own accord) - everything else about it is conditioned by "us" and we can know it to exist in no other connection than that which is so conditioned. We cannot know the "thing-in-itself" said Kant, we cannot know noumena, only phenomena.¹

"The main point is not that they (the objects to be known) are, but what they are.." says Hegel. In other words, the object under consideration is certainly not to be considered only as something which exists - that is an automatic supposition and point of departure the moment an object comes within the realm of consciousness - but rather as something which exists in a certain connection. However, in so far as Kant figured as Hegel's object of criticism here, the latter didn't exactly practice his preaching. He did not, in other words, ponder the connections in which Kantianism figured as an object of knowledge

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1. "There is definitely no difference in principle between phenomena and the thing-in-itself, and there cannot be any such difference. The only difference is between that which is known and that which is not yet known. And philosophical inventions of specific boundaries between the one and the other... is the sheerest nonsense, Schrulle, crotchet, fantasy."
- Lenin, Materialism etc., p.89.

except as something existing within his (Hegel's) consciousness. The same is true of nineteenth century criticism of Kant in general and therefore, as we shall see, of Marx. And because of this, it is generally true of twentieth century criticism of Kant: the criticism of Kant here has for the most part consisted in the parroting of Hegel and Marx. But these things we shall come to later. First we must bring Kant and his "science of right" back into the picture now that we are in a position to appreciate the "science" that is in it.

"Rightful" cognition and the "science of right"

Quite apart from the "science of right", it should be apparent that the faculty which gives it its "scientific" character is itself, in a way, "rightful". Kant already supposes that we are in possession of the faculty for making synthetic judgements; his aim therefore becomes one of showing the "rightful" limits under which this faculty is operative. What is the rightful character of this possession of ours? asks Kant, and the frequent analogies which he draws with the character of juristic thought throughout the Critique of Pure Reason are for this reason not accidental. But supposing that we already have in our possession the faculty enabling us to make synthetic judgements a priori, and supposing in particular, in Kant's case, that this faculty is being employed rightfully, before these rightful limits have been expounded, brings with it an error. It is the error of supposing that you know before you know. The particular circumstances of this in Kant we have already demonstrated in pointing out how he had to make transcendental deductions of the pure elements in the cognitive process, how, in other

words, he had to suppose the full and effective use of the faculty for pure cognition in order to arrive "rightfully" at the essential elements of that process. In this way even the pure categories of the understanding have as their condition (in being deduced a priori) their ineradicable mediation through an aesthetic. But that all knowledge must be limited by the subject in such a way always remains as a point of departure, as a supposition which must seal itself off from questioning. This error in Kant of believing the rightfulness of his answer as a condition of giving his answer is the principle of juristic reasoning par excellence. From the scientific standpoint it is, as Hegel remarked, the error of Scholasticus - who resolved not to venture into the water until he had learned how to swim.

Now a "science of right" might seem superfluous once a "juristic science" had been developed, that is, once Kant had developed the "rightful" conditions under which all things are known. On the other hand, it might be observed that right exists in particular, as distinct from being a mode of knowing the world in general, and that Kant would not have been outside of himself to have looked at some of

these particulars. But Kant only considered right in general. Effectively therefore he applied a legal view of the world (if we may refer to his theory of knowledge in this way) to a legal view of the world (as object). This latter we have already considered in Kant's definition of law; it is the testimony of (bourgeois) law as the riddle of "abstract individuality". Accordingly, Kant got a mirror-effect. He applied subjective idealism, the idealisation of subjectivity, which is to say, its complete and utter reduction to the pure ideality of space and time,¹ he applied this to "abstract individuality", to its closest material expression - the form of bourgeois law. It was therefore without a great deal of effort that Kant managed to declare right to be an idea of pure reason, because secretly and all along the idea of pure reason had been the purest, cleanest-possible, unadulterated expression of right, the notion of what is "rightful" masquerading as a theory of knowledge. Right is an idea of pure reason because

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1. "Let us get rid of a prejudice here: idealisation does not consist, as is commonly believed, in a subtracting or deducting of the petty and secondary. A tremendous expulsion of the principal features rather is the decisive thing, so that thereupon the others too disappear." - Nietzsche, *Twilight of the Idols* (Kant especially), p.72.

pure reason is a sublimated expression of the form of right - "abstract individuality" as subjective idealism. Right is an idea of pure reason: an effortless deduction. Kant didn't need to say anything at all about law as such (as object) in order to arrive at this conclusion because this conclusion is implicit in the mode of thinking.

Of course Kant does say things about right (as object). He says, for instance, that right accords with "a universal law of freedom". But this is already cogitated in the subject, as Kant would say. In other words, it is already posited as an identity with pure reason. Let us demonstrate this. Pure reason considers that it is the form of the subject (as thinking-subject) which furnishes the absolute limits upon our understanding. It is always expressed therefore as a subject/object dualism, with the subject doing the reconciling. The subject must find within himself the faculty whereupon the objective world falls within his grasp. We know that this must be so; otherwise there could be no knowledge of the world. So Kant, thinking that this alone is the condition under which things become known, sets out to investigate the limitations of this faculty. But to do this

properly he must use this very faculty himself, and not only this, he must suppose that he uses it according to the specific rules of pure cognition which he thereby hopes to deduce. Thus the juristic poise. Pure reason must determine its own limits. Causa sui. Similarly, the form of right accords with "a universal law of freedom". Freedom means self-caused. Right is therefore causa sui. Hence the identity of right and pure reason.

The Kantian "science of right" is merely the theory of pure reason in the so-called "practical" sphere - a mirror-image of itself. Right and pure reason can parade as either. This is precisely what Kant shows. But this is not because pure reason lays down the rule of right, as Kant said: it is rather an effect of pure reason as a sublimated form of right. This is proved further by the fact that whenever Kant begins to speak of anything resembling right in concrete, i.e. independently of right as a mirror-effect of pure reason, pure reason has absolutely nothing original to say. With none of Rousseau's flair, Kant talks lamely of the decisions of state only being justified on the grounds of universal assent, "and therefore (?)

by means of a contract." And further, of the sovereign will effecting commands to his subjects, as citizens, "only because (?) he represents the general will."¹ How pure reason manages to come up with these results rather than some other set of generalisations, Kant never says. But pure reason in any case doesn't say anything about anything in particular.

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1. On another occasion Kant says that the people, however, "cannot and must not (!) judge otherwise than the head of the state for the time being (?) may will." - which is most un-Rousseau-like. These quotations from Kant are cited in Gierke (Natural Law etc., pp. 134, 329, 354) who, as an admirer of the Historical School of Law, was most upset that he couldn't find anything resembling the German "volksgeist" in Kant's scheme. He says: "By pressing his distinction between homo phaenomenon and homo noumenon, and by making the individual co-operate in the creation of the general will 'only in his pure humanity' as homo noumenon - i.e. only in so far as 'pure reason, which lays down the rule of right', displays itself in him - Kant really eliminates personality from his scheme..He loses any conception of a living 'Subject' of the common sphere.." - *ibid.*, p.135. Whereas the "'Subject' of the common sphere" (merely another expression for the abstract subject) was purely formal, "empty", "dead" in Kant, the Historical School and its followers, instead of doing the decent thing by burying it with due respect etc., sought to bring it alive again. We shall have cause to mention the Historical School of Law in a little more detail post.

"Comical Niaiserie Allemande"

Why did Kant base his synthetic judgements a priori on a subject-mind? To answer that it was because he was, essentially, a pious old moraliser, and needed "scientific" reasons for his moral-preaching, is an answer that has a good deal of historical sense to recommend it. But this is a historical judgement on Kant, after Kant. It is a judgement that sees only Kant's agnosticism. It is a judgement which, in a rather self-satisfied manner, points to the consequences of being a Kantian long after Kant himself is dead and buried. How would these critics have fared had they lived in the eighteenth century? How properly conscious of history are these historically-conscious (they come primarily from the Marxist camp) criticisms?

Kant's agnosticism is an invention of the nineteenth century. In other words, to make our knowledge of the world conditional upon idealised subjectivity alone is not a mode of not-believing in the possibility of knowledge in the eighteenth century. Just the opposite. The Kantian limits upon the human understanding faithfully reflect the conditions of the possibility of knowledge as knowledge (of "man" at any rate) then existed, in

the eighteenth century. Kant's belief is not "no knowledge" (so that he can say what he likes in regard of how we ought to behave and pretend that his prescriptions are, in the best sense of the word, objective); just the reverse, his belief is in knowledge, because knowledge in the eighteenth century has precisely the kinds of limits set to it which Kant claimed. As we saw with Rousseau, the limit to his inquiries into Political Right is the "abstract individual", and Kant can do no other than express this limit as a theoretical condition; he therefore says no more than Rousseau.

The properly historical point is that Kant was a true and honest believer in knowledge, and expressed faithfully the conditions of the possibility of that knowledge, but that by the end of the nineteenth century this knowledge has become "no knowledge". Kant does not deliberately and conspiratorally turn himself into an agnostic; the growth of knowledge in the nineteenth century gives him the appearance of having done so. To call Kant an agnostic is a conceit of the nineteenth century. It is therefore a conceit which is reflected in Marxism. It is a conceit which is reflected

perfectly by Nietzsche, who stands on the threshold of the twentieth century as Kant had stood on the threshold of the nineteenth. "Comical niaiserie Allemande," said Nietzsche of Kant:

The spectacle of the Tartuffery of old Kant, equally stiff and decent, with which he entices us into the dialectic by-ways that lead - more correctly mislead - to his "categorical imperative", makes us fastidious ones smile, we who find no small amusement in spying out the subtle tricks of old moralists and ethical preachers.

This is a profoundly just testimony, not to Kant, but to the tremendous distance traversed throughout the nineteenth century on the road to our knowledge of "man". Kant is no impostor to the eighteenth century, quite the reverse; but the "Kantian" is already quite definitely, with absolutely no doubt, an anachronism by the end of the nineteenth century. The conditions of the possibility of knowledge have changed radically. No longer is our knowledge limited by "our" faculties, by idealised subjectivity; this has become merely the theoretical expression of "abstract individuality", the juridical form of appearance of bourgeois man, man as an owner of commodities and money. Kant becomes merely a legal philosopher. And the modern legal philosopher becomes a "Kantian".

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1. Nietzsche, Beyond Good and Evil, p.10
(trans. Levy).

It is therefore not true to say that Kant was an agnostic, that his transcendental subjectivism was subjectivism nonetheless and in this way denied the possibility of knowledge. This is what Kantianism became: it is not what Kantianism was. Kant did not deny the possibility of knowledge (this has become such a trite and hackneyed phrase in modern epistemology); he affirmed the theoretical conditions of classical knowledge and in so doing denied the possibility of knowledge outside of this field. He therefore denied not knowledge, but specifically modern knowledge. This, we shall see, has important implications for the development of modern legal culture.

It is also to be pointed out here that the notion of Kant the agnostic finds its counterpart in the notion of Kant the "ideologist". This too is a conceit which is realised specifically in the nineteenth century and, in particular, by Marx. The epistemological configuration mapped out by Kant is that of eighteenth century knowledge of "man". There is no doubt that it is an expression of bourgeois man, or, more specifically, man as a contradictory "abstract individual", as the personified form of property in exchange; a condition which is

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1. Marx, German Ideology, The criticism to be made against Marx is of the kind which says, metaphysician heal theyself - which is precisely the arduous struggle of which the German Ideology is symptomatic from the standpoint of Marx's intellectual development as a whole. For this reason, Althusser calls the German Ideology a "transitional" text, pre-dating as it does Marx's "mature" work in Capital.

The particular quotation from the German Ideology which is taken here appears also in Lukács introduction to his book on Hegel (p.xxiv), but according to him the quotation somehow shows that, "Here Marx has discovered and brilliantly formulated one of the chief reasons why philosophy had to develop in the direction of idealism in Germany." (ibid). But even if Lukács had chosen a more appropriate quotation to illustrate the view which he puts forward here, it is just this view, which is reflected in the German Ideology and which is uncritically reproduced by Lukács, which is defective. That philosophy "had to" develop in such and such a way is nothing more than an ex post facto generalisation of the facts from the standpoint of a historicity which those facts themselves could not possible possess.

made possible only where commodity-relations dominate social intercourse, namely, where capitalist production has fixed its roots. But this notion of the "ideological expression" only becomes possible as a condition of nineteenth century knowledge of "man", wherefore it becomes equally historically determinate and equally susceptible to ideological distortion when it is cast over its pre-history. For this reason, Marx's "transitional" work, the German Ideology, doesn't escape the same criticisms which it levels against others. In his criticism of Kant's thought, for example, Marx finds merely the pure expression of "real class interests". Kant, he says:

"separated this theoretical expression from the interests it expressed, made the materially inspired determinations of the will of the French bourgeoisie into pure self-determination of the "free will", of will in and for itself, of human will as such, and so he transformed the will into a set of purely ideological concepts and moral postulates.

In the same way that Kant was no agnostic, he was no transformer of the will "into a set of purely ideological concepts and moral postulates". Marx is here quite oblivious to the fact that the conditions for him saying this are rather different from those under which Kant gave expression to "human will as

such." By the time Marx comes to write the German Ideology, "human will as such" has become something altogether new; not merely a common will (hence an abstracted "individual" will as it appears in Kant), but a common will that has become premised in a conflict of class interests, and therefore in the hegemony of one particular class will. This condition just does not exist in Kant's time. The condition of Kant having "transformed the will into a set of purely ideological concepts and moral postulates" does not exist for Kant because it does not exist historically; it only appears that this is what Kant did when the conditions for him doing it become a reality. To "criticise" Kant in this way is therefore to engage in the typically "ideological" procedure of shunting one particular reality back into its pre-history. Only by the turn of the eighteenth century does the polarisation of bourgeois and proletarian class interests become a feature of bourgeois society. The characteristic feature of bourgeois historical development before this is a condition just the reverse of this polarisation. It is, as Marx knew full-well, the era of bourgeois revolution, and therefore of unity of interest between bourgeoisie and masses against the landed classes, the Church, the aristocracy etc.

That which becomes "ideological" in the nineteenth century is certainly, in general, the kind of knowledge of social man which is conceivable within the limited space described by the epistemological boundaries of subjective idealism. But in the eighteenth century is it something quite different. Kant didn't think for one minute that he was doing anything other than setting limits to the human understanding under the form of abstract subjectivity. He didn't "need" to believe in it, as Nietzsche said, that is to say, he wasn't on the defensive; more simply, he believed in it. Subjective idealism described the form of knowledge of man in the eighteenth century and, as Kant said, though this knowledge is grounded in the form of the subject, it is also, in the best sense of the word, objective. Throughout the course of the nineteenth century, however, this "best sense of the word" becomes this no longer.

Now it is not our aim to chart the developments in the growth of knowledge which bring this change about. Our aim is to clarify what happens to the "science of right" in all this. In the eighteenth century it has the same status as the knowledge of

social man in general, since the general configuration of knowledge of social man (as political, economic, religious, legal etc.) is limited as a whole by the kinds of epistemological barriers that are expressed in Kant. In the nineteenth century, this set-up is completely shattered - nothing remains the same.¹

In particular, the "science of right" doesn't remain the same. Yet this is the one subject-area which more than any other appears not to change. The theory of law still remains limited by the mysteries of "abstract individuality", whereas subject-areas hitherto constrained under this classical yoke are completely opened up, or rather, subject-areas that had hitherto not even been defined are discovered which situate the older fragmented commentaries having bearing upon their subject-matters in a new, more rigorous frame of scientific reference. In fact, this is what happens

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1. It is in this connection that Foucault remarks, "Before the end of the eighteenth century man did not exist..He is quite a recent creature, which the demiurge of knowledge fabricated with its own hands less than two hundred years ago: but he has grown old so quickly that it has been only too easy to imagine that he has been waiting for thousands of years in the darkness for that moment of illumination in which he would finally be known" - The Order of Things, p.308.

properly to the old "science of right", namely, it is developed outside the boundaries of what is apparently the legal sphere. The problem that it had hitherto confronted, the riddle of "abstract individuality" which organised the manifold of its speculations, becomes properly defined within the sphere of Political Economy. "Abstract individuality" becomes the form of individuality that is bound up with the problem of commodity exchange, value and production. On the other hand, the old "science of right", as such, doesn't go out of circulation; in fact, it gets a positive boost in this connection because once the "science" has been taken out of it, once the ground has collapsed from under it, it can only survive in this, its old form, as legal "science". What was the "science of right" in the eighteenth century, is, by the end of the nineteenth, legal "science". The characteristic form of modern legal discourse is therefore pseudo-science.

Further Considerations

Kant gave expression to the theoretical conditions of classical thought, that is, a mode of representative thought which begins to be eclipsed around the turn of the eighteenth century.¹ In the generality of his summary, Kant gives expression in particular to a "rightful" mode of thinking and, not surprisingly, the form of right becomes identical with pure reason. The Contract becomes an idea of pure reason; an impossibility is made theoretically legitimate. In fact all the "sins" of classical thought are washed clean through Kant's discovery of a subjective faculty capable of delivering synthetic judgements a priori.

1. Hence the verity in Hegel's well-known line that Philosophy always appears on the scene too late and, like Minerva's owl, spreads its wings only at dusk. - Preface, Philosophy of Right. Classical thought as a mode of representational thought which is systematically shattered throughout the course of the nineteenth century is the dominant theme of Foucault's study in "The Order of Things". The analysis of wealth gives way to Political Economy, Natural History to Biology, General Grammar to Philology. Foucault's is an "encyclopaedic" study of these fascinating metamorphoses.

True, Kant did not want to cleanse all "sins", far from it - only his own. And as "Kantianism" inevitably became an excuse for the shallowest forms of utilitarianism, it is strange that no-one has recognised a perversion of language here. There are sins and sins. Yet poor old Kant the agnostic has been made to take the blame for them all, thereby condoning the entitlement of the legal-utilitarian scribblers to their preferred description - the "Kantian". The term "Kantian" has become a term in the vocabulary of the most appalling pseudo-critical scholarship. A most appropriate example here concerns the legal theorist, Kelsen. He is called a "Kantian". Let us see how good a description this is.

According to Kelsen, "The science of law endeavours to comprehend its object 'legally', namely from the point of view of the law."¹ This at least is honest, if we overlook the rather pathetic inverted commas around the word "legally". In other words, Kelsen at least has the decency not to expand upon this "legally" with the addition, "namely from the point of view of science". But elsewhere throughout his "Pure Theory of Law" Kelsen

1. Kelsen, The Pure Theory of Law, p.70.

time and again shows no such restraint and repeatedly declares his efforts to be conformable with the utmost scientific rigour. The "Pure Theory of Law" is apparently a latter-day "Law as Pure Reason". However, whereas in Kant's day the idea of law as pure reason was, in the best sense of the word, an objective consideration of law, in Kelsen's case it is just the reverse: Kelsen's "Pure Theory of Law" is objective in the worst possible sense of the word. The "Science of law" à la Kelsen is anything but a science. Comprehending its object "from the point of view of the law", Kelsen's theory leads, not unnaturally, to a mere extension of the legal principle. Kelsen's theory is therefore "more" impartial, "more" dispassionate, "more" formal - more typically legal.

Kelsen's theory, therefore, never says, "you ought". This is its "scientific" condition. Instead of "you ought", which is a prescriptive statement, it gives the descriptive counterpart: it says, instead, "legal norm". This profound transformation from the prescriptive to the descriptive category becomes the crucial turning-point from law as such to legal science. This is because the descriptive statement, unlike the

prescriptive one, can be either "true" or "false". In this way the given classification of the given "legal norm" (because it is firstly either a legal norm or not a legal norm, and secondly either falls or does not fall within the said classification) is rendered unto the delights of analytic treatment. This analytic treatment amounts to the classification and systematic organisation of "legal norms" according to the principles of the analytic statement. The principles of the analytic statement are that they may be organised according to the rules of identity and non-contradiction.

Kelsen is therefore a representative of analytic Jurisprudence. There is nothing at all "Kantian" about it. To call Kelsen a "Kantian" overlooks everything which distinguishes Kant in the history of Philosophy, namely, the transcendental logic, the theory of the synthetic statement. The analytic statement and the principles thereof (Kant, incidentally, calls the principle of non-contradiction, the principle of contradiction) were for Kant old-hat. Kant's concern was with the synthetic statement, the statement in which is expressed the principles of scientific knowledge, the statement in which the object is not already cogitated, as he would say, in the given subject. The application of the rules

of the mere analytic statement to "legal norms", indeed, attests to the fact that nothing new is to be produced in regard of this subject (the "legal norm"), which, in this way, figures logically also as object. In other words, such a procedure is logically the mode of contemplating nothing else other than that which is posited within the limited horizon of the subject as such. Accordingly, the grand conclusion of analytic Jurisprudence can never be anything other than, law equals law - in Kelsen's case, a "basic norm" as "basic norm". Again, utterly different from the causa sui at the roots of the Kantian identity of law and pure reason, which is grounded in a synthetic unity of subject with object.

But if modern criticism has missed the distinction between the synthetic and the analytic, so basic to Kant's enterprise, it is perhaps even more astonishing that it has not been disturbed by the imperishable gulf which separates the ethics of Kant from those of the "Kantian". The ethics of a Kelsen are "no : ethics", i.e. utilitarian ethics. Utilitarian ethics are the natural ethics of modern "ethical neutrality", a phrase which, contrary to popular prejudice, has nothing to do with Kant.

1. Schwegler in his "History of Philosophy" says: "The moral purism of Kant - that is, his anxiety to purge the motives of action from all the greeds of sense - ends thus in rigorism, or the gloomy view that duty can only be reluctantly performed." p. 235. This exaggeration, he adds, was poetically captured by Schiller:

Willing serve I my friends all, but
do it, alas, with affection;
And so gnaws me my heart, that I'm
not virtuous yet -
Help, then, but this, there is none:
you must strive with might to contempt
them,
and with horror perform what the law
may enjoin.

Naturally, the Christian spirit gave Kant's denial of the flesh (so rigorous as to amount to the denial of life) a ready and willing ear. The Rev. Henry Calderwood, for instance, in his introduction to Kant's "Metaphysic of Ethics" is full of praise for the "(m)oral, or practical part" of Kant's philosophy; it brings with it, he says, "high positive results." For this reason, he believed that it should be considered in isolation from the "(i)ntellectual, or theoretic part" otherwise it would be tainted with an essentially sceptical deduction; The credit owed to the preception, in Scotch Philosophy generally, of such things as Kant's scepticism, is due in a large part to the work of J. Hutchinson-Stirling. The English underatanding of such things (around the turn of the nineteenth century) was, by comparison, truly backward.

In this latter connection it may be noted here that the general significance of appreciating properly the issues of Kant and "Kantianism" in their relation to legal culture is still much less likely to be grasped by the Anglo-American legal mind (if such an expression is permissable). An English translation of Kant's "Science of Right" by W. Hastie (a Scot, be it noted) bears the following prefatory note which is illustrative:

"Here/

Again, a strange perversion of language has taken hold here (which is as much the result of Marxian narrowness as it is of bourgeois decadence). Kant, far from being "ethically neutral", was completely and utterly "ethically convinced". Kant without the "categorical imperative" is no longer Kant, and so far as the ethics of "ethical neutrality" were concerned, he loathed and despised all forms of utilitarian opportunism. Post-Kantian "ethical neutrality" corresponds with what Kant would have called merely a "maxim of volition", which under no circumstances could be accredited with a claim a priori.¹

note 1 cont.

"Here is Austin's estimate of Kant's 'Science of Right': 'A treatise darkened by a philosophy which, I own, is my aversion, but abounding, I must needs admit, with traces of rare sagacity..etc. etc.' And here is his account of German Jurists generally: 'It is really lamentable that the instructive and admirable books which many of the German Jurists have certainly produced, should be redered inaccessible .. by the thick coat of obscuring jargon with which they have wantonly incrustrated their necessarily difficult science' ... So long as such statements passed as philosophical criticism there was no possibility for a genuine Philosophy of Law in England. Austin, notwithstanding his English reputation, is entirely ignored by the German Jurists.. Dr. Hutchinson-Stirling has dealt with Austin's commonplace Hedonism in a severe way, yet not too severely, in his 'Lectures on the Philosophy of law'." - p.xxiv.

"Ethical neutrality" is "Kantian" in the same way that the use of merely the principles of the analytic statement is "Kantian", the Kantian philosophy as such figures not at all. But if the "Kantian" element is merely a name which has been appropriated on behalf of these principles, it is clear that they must stand for something else. They are, in fact, the principles of modern legal ideology and to confound them with the old "science of right", the old identity of right and reason, is a perversion of the facts.

The modern identity of right and reason proceeds merely through "ethically neutral" abstraction. Abstraction here means systematically dissolving the object supposedly under consideration. It begins with the concrete thing and abstracts the most general characteristics from it and in so doing progressively disregards the factors distinguishing it from other things. In this, it becomes a process increasingly indifferent to the object supposedly under consideration: increasingly "ethically neutral". The "ethical" is clearly a superfluous addition here, because the aim of the process as such is ultimate neutrality in regard to everything. This, as we have already mentioned, is definitive of the analytic

principle, namely to say absolutely nothing about the world which isn't already said. Its aim is to add zero to the object under consideration. For instance, the analytic principle will say, "Socrates is a man". Far from concerning itself with Socrates, with what he wrote, where he travelled, Athenian culture and his popular role within it etc. etc., it dissolves him altogether. In the same way, the analytic principle will say, "Right consists in the application of rules". The object under consideration is immediately thrown out of the window, all that remains now are "rules" and the problem then becomes one of trying to re-find the object again amidst school rules, the rules of cricket, football, moral rules etc. etc.¹

Certainly, this is not "Kantianism", it is "positivism". Many will agree with this. But very few will know the difference. This is because the many will inevitably fail to notice the peculiar nature of the special "thought-sins" which Kant washed clean through his discovery of a subjective faculty capable of delivering synthetic judgements a priori. They will think this leads to "no knowledge"

1. cf. Hart, The Concept of Law.

just as does the analytic principle. And they will be reinforced in their convictions because a good old washing-powder, as efficient as that which Kant discovered, doesn't go out of circulation. Capital manufactures its cultural achievements over and over again, but what will escape their notice is the condition upon which it does this - that increasingly less "labour-time" is embodied in the final product. The historical result: "Kantianism" is "positivism".

The identity of "Kantianism" and "positivism" is a historical result, not a theoretical one. Theoretically, therefore, it is to be grasped as a historical result. The process which we have generally attempted to observe is a historical bifurcation of the old "science of right", the old identity of right and reason. What happens here is that the "science of right" is, on the one hand, dissolved into a problematic which comes to be occupied by the science of Political Economy, and on the other hand, and on this account, begins an ideological flight into "Kantianism". These two completely antithetical developments are descended from a unity to which neither can return, a unity

articulated in the Kantian identity of right and reason. Both, in completely opposing ways, claim succession; one by uniting right with reason in the theory of capitalist production (viz. by deducing the reason which is embodied in the form of right as essentially "economic" reason), and the other by merely clinging to the family name. Both these developments naturally pervert the old identity of right and reason; the former by consigning it to an ideology comparable with the latter, and the latter by vulgarising it beyond recognition.

In the Kantian (no inverted commas) identity of right and reason is to be observed the final sublimation of the old "natural-law prejudice". Thereafter its course is one of disintegration: a rigorous re-formulation within the domain of Political Economy on the one hand, and a debasement at the hands of legal culture on the other. As we have already remarked, this radical re-formulation of the conditions of the problem is not entirely blameless in the process under which the old solutions become debased - not unnaturally, since this re-formulation is, at the same time, a mode of putting the old solutions into scientific disrepute. But these old solutions have a rather special integrity

which is all-too-easily forgotten as their scientific disrepute (which is not in question) slips into a neglectful shorthand expression with the word "ideology", whereupon the actual debasement of the old solutions, which in general consists in a rudely eclectic parroting of them in what has become a wholly inappropriate context, becomes identified under the same auspices.

So perhaps now that we have escaped from some of the more obviously restrictive confines of "bourgeois ideology" we can claim to understand the language of equality a little better. For this latter is what the "old solutions" amount to. The Contract of Rousseau, the Reason of Kant: solutions to the antithesis of one with all, the subject with the object, the individual with right, solutions which seek to reconcile the dualism on the side of the subject, which appear therefore in the form of "abstract individuality". It is "man" therefore who "wills" the conditions under which he becomes equalised under the form of right. Yet "man" here is already abstracted as a presupposition. In "man" we already have an abstraction, a unit of equality. We have a language of equality. But more

than this, we have a language of equality working in respect to a real object. The equivalent unit actuates itself in the form "subject of a right". Therefore there is no question of a dominantly religious element in this language (obvious in Rousseau even if Kant presents some serious doubts). The object of equality is not posited in the nether-world; equality as a matter of right is not equality in the eyes of a redeemer. And for this reason a connective becomes possible between the old solutions, the immensely rich language which they articulated on the side of the subject, and the new developments of the equivalent form on the side of the object, the development of the analysis of exchange, commodities and human labour, production and, finally, the Critique of Political Economy.

Part III

Post-Classical Reproduction of Legal Culture:

Ch. 1. The Example of the Historical School
of Law.

Law, Natural and Positive.

... Further Considerations.

Post-Classical Reproduction of Legal Culture

The Example of the Historical School of Law

No amount of legal thought can get beyond "rightful" thought, and that is why, once we have understood Kant, we have understood the finite limits of bourgeois legal culture. It may be objected that there are others besides the Kantian theory of "rightful" thought. This is true, but it is not an objection. Only the Kantian limits are (legally speaking of course) in the best sense of the word, objective. And, indeed, there is no post-Kantian example in modern legal culture of thought ever reaching beyond the limits imposed by "rightful" thought, i.e. the Kantian identity of right and reason. As an example of this we may consider the school of law which considered itself to have got beyond Kant, the Historical School of Law.

Against the Hobbesian "bellum omnium.." man, according to Puchta, is endowed with the sense of right. "This sense", he says:

is.. destined to guard the condition of equality among men, by reducing their individual inequalities under that which belongs equally to all, namely, personality as the possible will/

will of all, and by thus setting limits to the impulse and tendency of the individual to refer and subject others to himself. The function of equalisation is effectuated by the individual being led to recognise others as possessing rights like his own.

Here we have merely another re-statement of the antithesis of individuality and equality. Right becomes the form under which individuals are made equal, a result of the individual "being led" thereto. The result is presupposed in the sense of the individual: subjective idealism.

But Puchta is of the Historical School and therefore, unlike Kant, he must bring the principle of the abstract subject to "life"; he must demonstrate its historical existence. And here it becomes tied up with a second principle, the principle of arranging its "development" amidst circumstances in which it never existed. Thus, when confronted with the historical development of law in Roman times, for instance, where the principle of the abstract subject is openly contradicted by the institution of slavery, Puchta and the Historical School declare that here we have right as such, but as yet unrealised. In other words the principle of right is there (because they say so) but the

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1. Puchta, Outlines of Jurisprudence, p.22.

historical evidence doesn't show it because History is still working on it and hasn't quite got it ready. (The *jus gentium*, of course, is pointed to as ample evidence that Roman history was getting on with the job). And so:

The principle of right has gradually unfolded itself to greater purity and clearness by laying aside, at stage after stage of its history, the accidental developments which have covered and obscured it.

For Puchta, a mere trifle such as slavery, the material basis of the whole of Roman civilisation, is just another "accidental development" concealing the purity of the principle of right. What is displayed here (pace Karl Popper) is the true poverty of historicism.

According to the principle of right, "(t)he function of equalisation is effectuated by the individual being led to recognise others as possessing rights like his own." This, clearly, is the principle of bourgeois right; the "individual" (already an abstraction) recognises in others "rights like his own". The principle of right here is therefore not just an equivalent form, but an equal equivalent form: bourgeois law. And without supposing the equivalent form as general in this way, there is no sense in talking of the "person" as

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1. Puchta, *ibid.*

the bearer of a right, as the abstract unit of of right as such. There is no such thing as the "person" as a right-bearing unit in pre-bourgeois society.

But for the Historical School the "person" is the principle of right *sub specie aeterni*. "Relationships of right are relations of persons to one another", says Puchta.¹ "Every jural relation consists in the relation of one person to another person," says Savigny.² The person is the unit of equality, the embodiment of the principle of right. But as such, as "person", he is abstract - thinkable because real (as bourgeois law) but not real because thinkable alone. "Personality is a common characteristic which is thinkable as subsisting equally in the most different individual circumstances.. it is just the prominent manifestation of the principle of equality,"³ Puchta says, but with no notion as to why it is "thinkable" as "the principle of equality" and form of right, even when it is expressly negated by his "historical" sense.

1. Puchta, *ibid.*, p.67.

2. Savigny, *System of Modern Roman Law*, Bk. 11, p.1.

3. Puchta, *Outlines etc.*, p.68.

The interesting thing about the Historical School is how their "historical" sense becomes accommodated within the language of equality, because it would appear that the slightest tincture of the historical would naturally move the abstract subject from its Kantian basis in "our" thought to something subsisting as a quality of the object of thought. In other words, it is reasonable to think that a little historical erudition would be sufficient to shift the question from right being considered under the form of abstract subjectivity to the conditions under which it is possible to consider the form of right in such a way. Where, for instance, is the impersonal form of the subject apparent in Roman law, in feudal law? The Historical School merely said here, the principle of right, i.e. of the abstract subject, is "gradually unfolding".

The language of equality speaks of "man", the "person", the "subject of a right" etc. without addition. But nowhere else other than in bourgeois society can these terms be connected as such with the form of law, because it is only bourgeois law which admits of such categories, which does not need

to ask, which "person"? Freedman, slave, lord, vassal etc.? On the other hand, bourgeois law does make distinctions regarding "persons" and this enabled the Historical School (and legal theorists before and since) to blur the essential distinction, namely, that the distinctions in regard of "persons" in bourgeois law (e.g. adulthood, sanity) are not of the same order. Puchta, for example, believed that he was talking of right in general when he said:

...the manifoldness of the propositions of right, are related to the fact that by the principle of right, the conditions of inequality in human life have to be subjected to the principle of equality, without, however, being abolished by it. The formation of right thus arises out of the continual antagonism of unequal relations, and continual subjection of them to the control of right. From this process the various institutions of right arise.

But the antithesis between individuality and equality which is expressed here is the peculiar condition of bourgeois right, and the "continual antagonism" between the two is the process at the roots of the "manifoldness of the propositions of (bourgeois) right".²

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1. Puchta, *ibid.*, p.45.
2. ante. Pt. I, Ch. 3, where this process is illustrated in its proper connection.

The language of equality, the language of the antithesis of individuality and equality, of the abstract subject, the "person" etc. - this is the language of the Historical School. They scorn Kantian formalism yet remain fixed precisely within the boundaries which it defined - one hundred years after Kant. Here is another example of the "historical" language of the Historical School. "If in the examination of the jural relation," writes Savigny, "we remove by abstraction, all its specific content, there remains over as a common nature, the united life of a plurality of men...", in other words, an abstract subject. Again, a specifically bourgeois condition innocently expressed in the fact that the plurality which is united in the jural relation figures merely as "men", subjects already abstracted. But Savigny goes on; "We might naturally be led to stop short at this abstract conception of a plurality and regard law as its discovery... but such an accidental meeting of an undefined multitude is a conception both arbitrary and entirely wanting in truth..."¹ Savigny is aware, in other words, of the circularity of a language in which the abstract subject is always supposed. How

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1. Savigny, System of Modern Roman Law, Bk. 1, p. 12.

to get beneath it? What is this abstract subject? Savigny's answer is well-known; it is the "spirit" of the people, the "volksgeist", an answer which left the question as much a mystery as if he had completely left it alone. Accordingly the simple idea of "custom" became for Savigny the means for observing the life-blood of law, as the manifold bringing the abstract subject to life.¹

1. For those who are led to believe that Savigny's ideas may be freely associated with those of Hegel, the following is noteworthy: "The supposition that it is customary law, on the strength of its character as custom, which possesses the privilege of having become part of life is a delusion, since the valid laws of a nation do not cease to be its customs by being written and codified - and besides, it is as a rule precisely those versed in the dearest of topics and the dearest of thoughts who talk nowadays of 'life' and of 'becoming part of life'." - Hegel, Philosophy of Right, p.135. Hegel attacked those who believed custom to be the "badge" of law (as Savigny put it) because he was wholeheartedly in favour of the codification of the laws. To deny a nation the right to codify its laws was for Hegel tantamount to tyranny, since it meant that the laws would be less accessible to the public and analogous to the act of Dionysius the Tyrant, who hung the laws so high that they could not be read clearly.

Nothing could be a more erroneous assessment of the Historical School than the following which is given by Gierke:

In Germany the theory of Natural Law disappears before the new world of ideas introduced by the Historical School. It was the achievement of that School to transcend, at last, the old dichotomy of law into natural and positive. Regarding law as a unity, and conceiving it as a positive result and living expression of the common consciousness of an organic community, the thinkers of the Historical School refused to content themselves with merely continuing to emphasise one or the other side of the old antithesis - they sought to achieve a synthesis of both in a higher unity.

The theory of natural-law "disappears" at the hands of the intellectual achievements of the Historical School of Law. On the contrary, the Historical School, if it did anything at all, brought the theory of natural-law back to life. It merely re-articulated the old "natural-law prejudice" in a "historical" manner. It did absolutely nothing to break through the mysteries of the abstract subject, and this despite the fact that the conditions in which these mysteries had hitherto been beheld no longer held sway. In place of the abstract subject it merely coined another expression with precisely the same theoretical content: "common consciousness".

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1. Gierke, Johannes Althusius, in Natural Law etc.. p.223.

Or, to use Gierke's expression, "living expression of the common consciousness of an organic community". How an inorganic community could be attributed with the form of consciousness is something which we may ignore; but the turn of phrase is noteworthy. "Life," "consciousness", "living", "organic" - the Historical School (of which Gierke himself is effectively a latter-day representative) were desperately concerned to force "life" into the old abstract subject, into the old "natural-law prejudice". Gierke himself repeatedly informs us that the "group - person" (sic. abstract subject) is "real", concrete, actual etc. and again and again delights in the stylistically distasteful expression, "real-group-person".¹

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1. Gierke's extraordinary enthusiasm over the existence of "real-group-persons" was something which he enjoined people to prove for themselves: "In our ordinary daily life any effort of attentive introspection will suffice to convince us of these spiritual forces. But there are times when the spirit of the community reveals itself to us with an elemental power, in an almost visible shape, filling and mastering our inward being to such an extent that we are hardly any longer conscious of our individual existence, as such. Here, in Berlin, in the Unter den Linden, I lived through such an hour of consecration on the 15th July, in the year 1870." - the day of the famous Ems telegram. cited, p.ixix, Gierke, Natural Law etc.

Law, natural and positive.

As for the Historical School having "transcend(ed)", at last, the old dichotomy of law into natural and positive," there are a whole mass of common errors concealed here and now is as good a time as any to consider them. In the first place, the "transcendence" of the "old dichotomy" refers to a development which takes place quite independently of what the Historical School may or may not have said, and so far as the Historical School gave expression to this development they really added nothing to what is already clearly apparent in Grotius, Puffendorf or Hobbes two hundred years earlier, namely, that "natural-law" had become "positive". Secondly, it is not really at all the "old dichotomy" which is "transcended" here (the condition of the "old dichotomy" was that it could not be "transcended"), but rather a question that has to do with the emergence of an entirely new form of law giving rise to the appearance that "natural" and "positive" law are collapsable.

The "old dichotomy" of natural and positive law is a characteristic feature of medieval political circumstances. But it may be considered older than this; a dichotomy of natural and positive law is

clearly evident in ancient and Roman times, but again it is of an altogether different nature from the dualism as it subsisted later on in later Roman and medieval political thought. Natural law in general, however, embodies the principle of equality. Thus it becomes apparent why, in the bourgeois era, the dualism disappears and the theory of natural law becomes identical with the theory of law as such, for here the principle of general equality becomes the indicium of positive law. But this has nothing to do with the realisation of the Christian principle on earth, the principle with which natural-law was associated in medieval times, nor, indeed, with the Stoic principle, with which natural-law was associated in ancient and earlier Roman times. More mundanely, it has to do with the development of capitalist commodity production and the equal relations of generalised commodity-ownership which it ushers forth.

Let us give a schematic picture of the historic metamorphoses of the so-called "old dichotomy" - it is a veritable fountain of errors in legal historiography.¹

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1. cf. Friedrich, Philosophy of Law in Historical Perspective; D'Entrevés, Natural Law, for the circumventions of these problems.

Firstly: natural-law according to the Stoic view. The equality principle here is that all men are naturally equal, which means neither equality only in the eyes of God (as distinct from the world, which is the principle of medieval natural-law), nor equality in the eyes of the law (bourgeois natural-law). Its meaning is specifically ancient. For example, the "Republic" of Zeno, the founder of the Stoic sect, is summarised by Plutarch as aiming singly at this:

that neither in cities nor in towns should we live under laws distinct one from another, but that we should look upon all men in general to be our fellow-countrymen and citizens, observing one manner of living and one kind of order, like a flock feeding together with equal right in one common pasture.

This is utterly un-Christian. The Stoics were concerned exclusively with "this world" and were pan-theistic (God and the world being identical). This is also, needless to add, utterly un-bourgeois. But the important point here is that such a doctrine is completely antithetical to the positive laws of antiquity: "Neither in cities nor in towns should be live under laws distinct one from another". A doctrine symptomatic of the ruin of the city-states. But

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1. Plutarch, *Morals*, Vol. 1, "Of the Fortune or Virtue of Alexander the Great".

as Greece becomes a province of Rome and as Diogenes takes Stoicism to Rome, the antithesis is no less acute. Roman law is still Roman law.

The Roman jurists, accordingly, could have nothing to do with natural law. Even in regard of the "law of nations" it could only mean confusion:

For Gaius *jus gentium* and *ius naturale* are the same thing: the law which nature has instilled into all nations. But other jurists who mention the matter, who are later, commonly distinguish, pointing out that slavery is *iuris gentium*, contrary to *ius naturale* (*contra naturam*). Ulpian goes further and identifies *ius naturale* with instinct, and Justinian adopts the views of Gaius and Ulpian as if they were the same."

1. Buckland, *Roman Law*, p.53. Buckland, however, has no understanding of the dualism in question, for he adds: "Accordingly it has been maintained that, for the age of Hadrian and before, there was no difference, but that in the late classical age the two ideas began to be distinguished and the distinction became a standing part of mediaveal political thought." - *ibid.* As shown in the text, just the reverse is true. That there was "no difference" up to around the time of Hadrian means really that the jurists pre-Hadrian had not troubled themselves with the issue of natural-law, i.e. not because there was "no difference" between this (which still had strong connotations with Stoicism) and the law as such, but because the dichotomy was glaringly absolute. That "in the late classical age the two ideas began to be distinguished" is symptomatic of their coming together in a new form, so requiring distinction, especially along the lines of "rendering unto Caesar..etc." (positive law) and unto God that which is His (natural law).

The identification of natural-law with the *jus gentium*, the legal-form which grew up because and so far as commerce and trade had become the imperial rule, is rather like a distorted premonition of the bourgeois synthesis. But in general the Roman jurists were utterly unconcerned with the natural-law principle in anything resembling the true Stoic sense. To have attempted any involvement of such a principle with their law would have marked their complete ignorance of the latter - and only a lunatic would want to assert that the Roman jurists were ignorant of Roman law. Such are the conditions of the dualism of natural and positive law in these early times. Basically it is a dualism of the principle of human equality (for this world) and the institution of slavery.

But slavery can accomodate Christian natural-law: the principle of equality in the eyes of a God separated off from the world, from life, from everything. For all their severe austerity, the Stoics had never "denied" after the fashion of a "kingdom not of this world", quite the reverse. But the "kingdom not of this world", music to the ears of

Pilate, negates completely the conditions of the "old dichotomy".¹ This new "old dichotomy" is

1. Perhaps a few words of explanation are required here in regard of the "music to the ears of a Pilate". The original scene runs as follows: "Pilate therefore entered again into the judgement hall and called Jesus, and said unto him, 'Art thou king of the Jews?' Jesus answered him, "Sayest thou this of thyself, or did others tell it thee of me?' Pilate answered, "Am I a Jew? Thine own nation and the chief priests delivered thee unto me: what hast thou done?' Jesus answered, 'My kingdom is not of this world: if my kingdom were of this world, then would my servants fight, that I should not be delivered to the Jews: but now is my kingdom not from hence.' Pilate therefore said unto him, 'Art thou a king then?' Jesus answered, 'Thou sayest that I am a king. To this end was I born and for this cause came I into the world, that I should bear witness to the truth. Everyone that is of the truth heareth my voice.' Pilate sayeth unto him, 'What is truth?'" - John 18, 33. According to Hegel, Pilate asked the question, "What is truth?" with the air of a man who had settled accounts in that quarter long ago (Logic, p.27). The reason for what Hegel considered an apparently complacent gesture here is that Pilate didn't need to know any more. As soon as he heard the words, "My kingdom is not of this world", he was happy - no threat to the Roman imperium here. 'Art thou a king then?' he goes on to ask, in an amused kind of way, to which Jesus replies, "Thou sayest that I am a king." Pilate, of course, had said no such thing; he was merely teasing out what was to him a rather irrelevant notion of kingship. Compare Niebuhr, Beyond Tragedy, p.273 et. seq. I cannot resist quoting Nietzsche in this connection, who says, "Do I still have to add that in the entire New Testament there is only one solitary figure whom one is obliged to respect? Pilate, the Roman governor. To take a Jewish affair seriously - he cannot persuade himself to do that...The noble scorn of a Roman before whom an impudent misuse of the word 'truth' was carried on has enriched the New Testament with the only expression which possesses value - which is its criticism, its annihilation even - "What is truth?'" (Anti-Christ, p.162). cf. generally Feuerbach, Essence of Christianity.
- The original independence of Christ from politics, of course, became subsequently a basis for the political harnessing of Christianity.

something else again. Really it is no longer a dichotomy, but a synthesis - a synthesis which is the result of a principle of equality that is capable of living in harmony with every conceivable form of worldly human degradation. The historical conditions of this particular "old dichotomy" are characteristically feudal and date roughly from around the eclipse of the Roman imperium to the dawning in the West of bourgeois civilisation.

The "old dichotomy" in the Middle Ages is therefore grounded in a synthesis of Christianity with the feudal order, of prelate with prince. And because this is so, there arises the continual need to distinguish one from the other: natural law from positive law, the justification from the beastly act. But the justification only offers "redemption" on the condition of "sin", and similarly the brutal "positive" laws of the prince may only be executed on condition that they are "justified". The finest expression of the mutually parasitic character of Christian theology and feudal petty absolutism, which finds for it a basis in "higher reason", is achieved in Thomist scholasticism. But, of course, this "higher reason" is still

Christian theological reason, for all the respect which is paid to Aristotle. However, our aim is not to go into these matters in any detail, but merely to draw a very schematic outline of the historical conditions of the "old dichotomy" of natural and positive law.

Finally, we come to the "old dichotomy" in the bourgeois era. No longer is the principle of human equality in the eyes of a God who is independent of the world a sufficient reason for the form of law. And yet, for all appearances, bourgeois law is more "Christian", or rather, more positively "Christian" than feudal law. But at the same time the historic appearance of bourgeois law coincides with the eclipse of Christian theological natural-law dogma, that is, just at a time when one would reasonably expect it to have become more convincing. Still, there should really be no surprise, since Christianity has always been consistent in this: it has never sought positive evidence in "this" world, only negative evidence, only the "bad" things, man's corruption, his greed, his "sin", his misfortune (old age, sickness etc.), that is to say, evidence conducive to "faith" in a world somewhere (psychologically speaking, anywhere)

else. Accordingly, it is an entirely new principle of equality which is expressed by "natural-law" in the bourgeois era. It is the principle of law as such.

By way of recognition of this radical break with Christian natural-law, vulgar historiography observes the "transcendence" of the "old dichotomy", the "secularisation" of natural-law, the appearance of "positive" natural-law and so on and so forth. From all that we have said about bourgeois "natural-law", the "natural-law prejudice", its conditions and limitations, the mode of its articulation and variations within that mode, it is clear that such expressions are completely and utterly inadequate, if not false. Such expressions are commonplace in modern legal historiography and as a general rule, wherever they appear, it is a "'positive' natural-lawyer" himself who is speaking, namely, an empty vessel. For, really, there is no such thing as "secular" or "positive" natural-law, or the process of the "secularisation" of natural-law (as it is called). It is not the "same" object which undergoes a supposed cleansing of theological dogma in this connection. Subtract theology from scholasticism

and one is left, perhaps (it is not an entirely rigorous proposition), with a few propositions from Aristotle. But in any event, one would certainly not have Grotius, Hobbes, Locke, Hume, Rousseau etc. etc. amongst a host whom the modern legal historiographer artlessly subsumes under a process of "secularisation" of natural-law.

On the more material side of things, (medieval) natural-law, as that which is supposedly "secularised", figures and can only figure as itself, i.e. as natural-law: the expression of the conditions of the feudal order, the unity of theology with the form of law, the form of political rule. The form of law here is heterogeneous, unequal, enmeshed in privilege and vested interest, often brutal and barbaric: hence, it is inextricably bound up with the Christian "promise", with "justification". This is the essence of natural-law. "Secularised" it becomes naked barbarism. "Secularised" theoretically, that is, taking it in its finest and most reasoned sense (in Aquinas), this barbarism is displaced in a sublimated flight back to the refuge of the ancients. Aquinas subconsciously seeks refuge with his "philosopher", as the scholastics called him (Aristotle): a profound

testimony that his theology is inadequate, that it is indissolubly mixed with the miserable conditions of the feudal order.

The "secularisation" of natural-law, if such a thing is to be sensible, must refer to its stated object, namely, the conditions of the feudal order. If we do this, we learn a little about the character of the feudal order; we learn that without religion it is barbaric and that with religion this barbarism is "justified". But for all this we learn absolutely nothing about bourgeois "natural-law". The modern legal historiographers who think otherwise, who move freely from the Stoics to Aquinas, to Kant and literally all over the place, displaying their erudition in the process, commit themselves to a conclusion that they would be appalled to admit: that the modern classical position in regard of the theory of law reflects the historical emergence of pre-feudal barbarism. This at least is the proximate conclusion which may be ascribed to those who believe the modern classical thinkers to be "secularisers" of natural-law.

The bourgeois era ushers in nothing at all resembling the "secularisation" of natural-law, and nor therefore is it the "old dichotomy" which is

reconciled here. The "old dichotomy" was already reconciled, transcended and united as a condition of the feudal order of things. Natural law was not in the least bit independent of positive law in feudal times; each was absolutely conditional upon the other. What comes to be articulated in classical thought is therefore an altogether different unity: not God and the world (as an antithesis), but man and man - individual and individual, the principle of general equality as the principle of law. This we have already dealt with.

Further Considerations

Let us return to the "example" of the Historical School of Law. The error of historicism, of distorting both past and present by reading back the superficial appearances of the latter into a past in which they never existed, is not a distinction which is peculiar to the Historical School of Law. The Historical School just presents a "good example". The superficiality which is read back into bygone times is the form of the abstract subject. This the Historical School considers to be the historical form of law in general. But in previous periods it is constrained by various circumstances: this "it" can only figure therefore in the principle of natural-law in medieval times (as distinct from the "positive" law). However, the Historical School considered it to be their good fortune to be living at a time when "the" principle of right had been fully unfolded; no longer is "it" (it never occurred to them that "it" might be something rather different) confined to the world beyond. Here "it" was on their doorsteps: the abstract subject, no longer there by the grace of the Holy Spirit, but here in the "real", "live", "organic" etc. form of the

"Volksgeist". Thus the Historical School's "transcendence" of the "old dichotomy": a circumspect way of saying that God becomes the Fatherland. Vulgar, belated (late nineteenth century) German bourgeois nationalism. "One school of thought that legitimises the infamy of today with the infamy of yesterday," said Marx, "(is) the historical school of law - this school would have invented German history were it not itself an invention of that history."¹

But just as theoretically disreputable are the schools of legal thought which appear later - and not merely in Germany. Nothing is changed when the "Volksgeist" is made even more "positive", when it is turned into the "common purposes" of the Interest School of Jurisprudence, or the "socially organised purposes" of the French legal theorist, Duguit (who in this connection plagiarises the sociological positivism of Durkheim), or the aspirations of the petty bourgeois "Ego" of the latter-day followers of Bentham in England. All these are merely modes of inflating with the most unspeakable theoretical rubbish the same old abstract subject long since eclipsed at the twilight of classical thought.

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1. Marx, Early Writings, p.245.

Since the Germans are useful in the provision of "good examples", let us bring the story into the twentieth century with the post-Historical School developments in the theory of law. Clearly, with the turn of the nineteenth century, the idea of the "Volksgeist" begins to look a little specious, "a little too close to natural-law after all", the legal thinkers began to say. Spirit still meant spirit when all said and done, and with this the search began for something a little more "positive" with which to re-vitalise the skeletal frame of the abstract subject. On the other hand, this frame wasn't exactly bare - theoretically perhaps, but not empirically. It may not have been "spiritual", but it was still the "living expression of the common consciousness of an organic community". A scientific-sounding phrase like this didn't need to go into the dustbin. But what was this "common consciousness"? In other words, again the question, what is the abstract subject? Gierke had persisted that it was "real", a "real-group-person" and, after his little experience in the Unter'den Linden, decided that its secret rested finally in an appeal to the "spirit" of natural-law (the "old dichotomy" wasn't dead after all).¹ And this rule did not

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1. Gierke, Natural Law etc. cf. ante.

change, that is to say, the answer to the question of the abstract subject remained that "we" must determine it to our own judicious satisfaction. The legal theorist, Ihering, baptised this as the "teleological method", whereupon the Interest School of Jurisprudence established its foundations.

With the "teleological method", a method distinguished by its built-in facility for first deciding, quite arbitrarily, upon a given result before the historical "evidence" is adjusted accordingly, the errors of the old Historical School were shamelessly and openly declared as a principle of Jurisprudence. "Ihering was originally a conceptualist", says Heck, the principal exponent of the Jurisprudence of Interests, but, "(h)e turned from a Saul into a Paul. He advanced the following principle: Law is not created by concepts but by interests...Therefore Ihering is justly recognised as the founder of the Teleological School and consequently the Jurisprudence of Interests."¹ The notion of the "conceptualist" here refers to the legal theorist who applies the analytic principles of logical thought to the legal form, who is doomed therefore to saying nothing more about law in particular

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1. P. Heck, in 20th century Legal Philosophy, Vol. 2., p.35.
cf. Ihering, Law as a Means to an End.

than literally any other set of propositions about the world.¹ Accordingly, there is a measure of sense in this "conversion" of Ihering's. But what is the hallucination (Heck's analogy is fitting) in this instance? "Law is not created by concepts but by interests." This seems quite the reverse of a hallucination, almost a materialist principle in fact. But what is really expressed here is an extremely vulgar dichotomy of "concepts" and "interests". What is meant is that "concepts" (and not merely those of the "conceptualists") are irrelevant in the Interest School's view of law. Simply because "law is not created by concepts" (it hardly needs be said) it by no means follows that our understanding of law is not thus created. But the "teleological method" sees law as the expression of "common purposes" or "interests" and, not being able to get to the bottom of this (which is just yet another term for the form of the abstract subject), its exponents artlessly declared that these "interests" were something to be determined by them alone - after the manner of the judge's determination of the "public interest".

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1. cf. ante, the discussion of analytic principles in connection with "Kantianism".

The Interest School draws out in a "positive" manner (that is, an "unashamed" manner) the inevitably anti-scientific stance of modern jurisprudence. In this is to be observed a characteristic repulsion of any scientific solution to the riddle of the abstract subject. The old Historical School, for example, had said that it was the "living expression of the common consciousness" of the community. Subsequent legal thinking can say no more; it can only turn in on itself: the "common consciousness" becomes a matter which it must decide purely on its own account. It is not resolved as an object, but quite arbitrarily as a subject pretending to think it as an object. Law is to be determined as a moment of the community in which it finds its expression, the Historical School had said, yet on the other hand it became a matter for legal thought to decide the true content of this relation. Law is thus posited as both object of inquiry and "solution" to the problems posed therein. Legal thought becomes a playground for the duplication over and over again, in a manifold variety of ways, the "Kantian" and historicist errors.

In the case of the Interest School, "rightful" thought becomes "teleological" thought: "we" decide upon the form of law, "we" interpret the abstract subject, the "common purposes" inscribed therein - not as an object in itself, but as something which is exclusively "for us". Binder, a "Hegelian" supporter of the Interest School observes its essentially juridical character when he says:

Let us grant that the Jurisprudence of Interests has progressed beyond the most narrow positivism in so far as it has rediscovered the teleological element of law. Nevertheless Stammler's saying applies to it, that he who maintains that the "justness" of law must be measured by its appropriateness to the end pursued, "has not thought (the matter) through". For the question of whether something is an appropriate means for this or that purpose has fundamentally nothing to do¹ with the question of whether this means is law.

We may just take the opportunity to further observe that neither the "Hegelian", Binder, nor the "Kantian", Stammler, were capable of "thinking the matter through". The form of law for both of these involved (again) nothing else but a re-formulation

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1. Binder, J., in 20th century Legal Philosophy, Vol. 2, p.301.

of the mysteries of the abstract subject. Stammler merely re-asserted the "natural-law prejudice" in deference to its classical origins, symptomatically pointing out that contemporary developments in legal theory had in no way surmounted the "solutions" of nearly two hundred years earlier.¹ Binder, on the other hand, simply parroted Hegelian terminology in considering the form of law as a unity of universal and particular will. In this there is nothing more than yet another circumspect expression of the abstract subject, namely, as the equalisation of a host of particular wills under the form of one which is in common - all of which goes to show the truth of the statement with which we began this section: no amount of legal thought gets beyond the limits of "rightful" thought, the limits of thought itself as abstract subjectivity - proscribed by Kant in the eighteenth century.

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1. cf. Stammler, Theory of Justice.

Part III

Ch. 2. Legal Sociology...

- a. The Return of the "Contract":
the "free" contract.
- b. "Origins" and the Legal Form.
 - 1. Roman Law and the idea
of its "reception".
 - 2. "Status" Distinctions:
Feudal Law.
- c. Legal Rationality.

Legal Sociology.

The Return of the "Contract": the "free" contract

1. In legal sociology are reproduced the errors of the old "Contract": pre-positing at the dawn of civilisation (Rousseau) and considering in this as conformable with reason itself (Kant). They are reproduced, however, in connection with a more "positive" contract - the "free" contract.

The "free" contract is, in the common phrase, a "bourgeois" notion. In other words it is a notion which cannot properly be applied in general (to Rome or the Middle Ages for example); it expresses a definite legal content and consequently, corresponds specifically with capitalist social development of production and exchange. The "free" contract is essentially bound up not with the historically general existence of commodity exchange, but with the historically specific existence of generalised commodity exchange - a distinction which is systematically overlooked in legal sociology.

Once the "free" contract is considered independently of bourgeois society, its definition becomes impossible. Of course, there is no need to be dogmatic about the issue; it is not impossible

to say of a contract *juris gentium*, for example, that "X freely contracts with Y". But if this is an instance of the "free" contract, one of its conditions becomes that neither X nor Y are slaves, which is to say, that the existence of slavery is supposed. Further, the form of property in exchange around which contracts *juris gentium* became articulated is not merely this, not merely the commodity-form, but the commodity-form because and so far as it had been developed under slavery. In this way freedom of contract becomes conditional upon slavery - which is definitely not what those who liberally apply the notion in this way wish to conclude. Max Weber, for example, applies the notion, freedom of contract, to pre-capitalist social formations. What does that turn the "free" contract into? It turns it into something which is utterly indifferent to both the nature of the contracting agents and the subject-matter over which the agreement is made. The subject-matter of the agreement may be *res mancipi*, feudal labour-service or gilt-edged stock, and by subsuming all and sundry in this way under the development of freedom of contract (which is what Weber does) any differentiation of the thing on historical grounds

becomes impossible. In other words, the "free" contract becomes impossible to define: the "free" contract remains the "free" contract. But we shall look at Weber more closely in this connection shortly.

The historical ground of the "free" contract is only bourgeois society, where commodities, money, labour-power all circulate "freely", without any apparent compulsion. There is no knout hanging over the wage-slave, no feudal lord with all his overtly coercive appurtenances weighing in the balance with the wage-labourer's inclination to perform "labour-service" for his subsistence. The mass of people here move "freely" to market, "freely" contract with their employers in return for a wage which in turn becomes divided into numerous "free" contracts in the purchase and sale of wage-goods, and the product of labour, in the hands of the capitalist, is converted via innumerable "free" contracts into money which in turn divides into further such contracts in the replacement of equipment, purchase of raw materials, re-purchase of labour-power etc. etc. not forgetting the capitalist's own expenditure upon the luxuries which his "enterprise" has earned him. Only in these circumstances is the abstract right-bearing unit

of the "free" contract generated. Only here is the contractual agent "free". "Free" because equal: no apparent compulsion on either side whether the agents concerned are building societies, Trades Unions, John Does, Richard Roes, Assorted Fabrics and so on and so forth.

Yet given all this, it is possible that one (a persistent formalist perhaps) would still want to say that the Roman citizen, for instance, was a "free" contractual agent and that the slave, being an exception, is analogous to the infant or the idiot, who are exceptions to the rule in modern times. However, in that case one is also committed to the view that infancy, idiocy etc. furnishes the material basis of the bourgeois social edifice, for the slave in Roman times was anything but a "technical" exception from "free and equal" legal personality. The "free" contract on closer examination cannot possibly be merely a form: form always supposes content, even when posited as mere form. And for this reason the "free" contract cannot possibly be arbitrarily ascribed its content. It already has a content, so to speak, and it is quite erroneous to have it pre-posed merely as a form, in antiquity for instance, and from there

have it "develop" through history, taking an increasingly large proportion of society under its auspices. This is the error of historicism. It is the error of Max Weber - which is nevertheless precisely the same error made by the man who, supposing his understanding of money, labour, raw materials etc. applied under all circumstances, sailed from England equipped with a plentiful supply of such things only to find when he got to his Crusoesque destination that he had forgotten to take with him the capitalist mode of production. His "free" wage-labourers deserted him. Similarly the "free" contract deserts the legal historian and sociologist when he looks for its "origins" outside the conditions of capitalist social production and exchange. But we must now look at the "free" contract in a little more detail.

2. The "free" contract supposes the commodity-form of property. Let us see how. The notion of "freedom" appertaining to the act of exchange means that there is an absence of compulsion on either side of this act. But how does this come about? How is it that the contracting agent is supposed "free"? - especially as it is patently obvious,

for example, that if a worker does not "freely" sell his labour-power on the market, *ceteris paribus* he will starve. "Freedom" here is merely a reflection of the equivalent form of exchange in which the contracting parties are equal because and so far as they are owners of commodities. As equals, neither of the contracting parties exercises any compulsion over the other: thus they are "free". The "free" contract arises on the basis of the commodity-form of property.

Hegel, interestingly enough, deduced this relation the other way around: the commodity-form of property becomes a result of the contract.

He says:

The two wills and their agreement in the contract are as an internal state of mind different from its (the contract's) realisation in the performance. The comparatively "ideal" utterance (of the contract) in the stipulation contains the actual surrender (!) of a property by the one, its changing hands, and its acceptance by the other will...Thus in the stipulation we have the substantial being of the contract standing out in distinction from its real utterance in the performance, which is brought down to a mere sequel. In this way there is put into the thing or performance a distinction between its immediate specific quality (its use-value) and its substantial being or value, meaning by value the quantitative terms into which the qualitative feature has been/

been translated. One piece of property is thus made comparable with another, and may be made equivalent to a thing which is (in quality) wholly heterogeneous. It is thus treated in general as an abstract, universal thing or commodity.

Of course the stipulation does not contain "the actual surrender of (the) property". It certainly takes an imagination to see in the formal stipulation the "actual" transfer of property;² this is only

1. Hegel, Philosophy of Mind, p.245. The brackets are mine. Everything here is made an effect of "Mind", i.e. Hegel's mind.
2. The stipulation is the contract as such, i.e. as it exists legally. Hegel perhaps had in mind the Roman stipulatio, which as a form of contract was contained perfectly simply in the use of the words: "Dare spondes?" - "Spondeo". Historically it amounted to a simplification of the older more cumbersome and ritualistic forms of nexum and mancipatio. It came into being during the most important period in the development of Roman law, viz. the period of the Republic, when great conquests were laying the foundations of the Empire. The corresponding growth of commerce and trade facilitated by efficient political administration revolutionised the older Roman legal forms.
- "The obligation created by the words, Dare Spondes? Spondeo, is peculiar to Roman citizens. The others - Promittisne? Promitto; Fidejubesne? Fidejubeo, etc. - belong to the jus gentium, and therefore hold good between all men, whether Roman citizens or aliens." - Gaius, Institutes, 111, 93; cf. Justinian, Institutes, 111, 15.

what is relevant from the legal standpoint. But what Hegel adds to this legal view, which sees only "two wills and their agreement", is an important logical condition which arises therefrom, namely, that the things exchanged are reduced to a common form, the commodity-form. On the other hand, the commodity-form is not the effect of the contract, that is, something resulting from the contract as such, i.e. as "two wills..." etc., but rather the commodity-form is the condition of the contract.

What makes it possible for the mutual alienation and appropriation of property to be conceived as a "free" contract, as a free act of will, is a preparedness to subsume whatever is exchanged under the commodity-form. But the commodity-form is so because and so far as production is production for exchange and because and so far as human labour has become homogeneous social labour. The conception of the "free" contract, of two mutually independent, yet equal wills forming an agreement is therefore similarly conditioned.

At this stage it is not beside the point to recapitulate upon the proper "actual" conditions of the commodity-form of property. In bourgeois society the commodity-form of property is a relation of capital and wage-labour. Wage-labour assumes the commodity-form of labour-power which like all commodities is alienated and appropriated in exchange. But this is not all. The "substantial being" of labour-power is hardly as property in exchange, which, following Hegel, is supposedly contained as such merely in the formal utterance of the contract. Labour-power subsists far more "substantially" in the labour-process. Labour-power, the ability to create, re-create and expand value, is alienated by the worker and appropriated by the capitalist who consumes it in effectuating that ability with his (the capitalist's) means of production (machinery, land, raw materials etc.). The product of the labour-process which is thus set in motion, i.e. the goods produced as a result of the given productive operation, which represent an augmented value in relation to the value initially laid out and used up in the productive process, belong to the capitalist. Labour-power is "substantially" appropriated therefore not in the

contract but in the labour-process. It is appropriated here for a given duration. Consequently, it is not immediately apparent that anything "substantial" has been given up, as in the case of alienation and appropriation of bread, wool, books etc. - the labourer's commodity is still captive in his own being at the end of the working day. Still, if nothing had been alienated in this instance, there would be no product at the end of the labour-process, no bread, wool, books or anything. What actually happens is that flesh, bone, brain and muscle, in their operation, have been given up and transferred to the subject of labour and have become materialised in the product - a product which is owned by another. "Labour has incorporated itself with its subject: the former is materialised, the latter transformed. That which in the labourer appeared as movement, now appears in the product as a fixed quality. The blacksmith forges and the product is a forging."¹

It is only here, in the form of the commodity-product, where the legal form again picks up the thread, so to speak; where the form of property

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1. Marx, Capital Vol. 1, p.176.

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1. "Will" again determines the form of property for Hegel in the case of landed property, in which connection Marx says, "Nothing could be more comical...According to this, man as an individual must endow his will with reality as the soul of external nature, and therefore must take possession of this nature and make it his private property. If this were the destiny of the 'individual', of man as an individual, it would follow that every human being must be a landowner, in order to become a real individual. Free private ownership of land, a very recent product, is, according to Hegel, not a definite social relation, but a relation of man as an individual to 'nature', an absolute right of man to appropriate all things.." - Capital, Vol. 111, p.616-7.

again becomes undifferentiated from the form in which it began the productive operation, i.e. the commodity-form. In other words, the legal form, since it only supposes the form of property as property in exchange, since it expresses one true thing and gently declines to recognise anything else, misses entirely the particular form (here, the capital-form) by which commodities are produced and re-produced over and over again. The legal form therefore systematically declines to look into itself, as it were; it stops at the commodity-form, it begins at the commodity-form - it is the commodity-form, as abstract subject, as "free" contractual agent and the numerous developments and determinations thereof.

The contract, according to Hegel, supposes the commodity-form of property. But in this it supposes a great deal more, because the commodity-form is conditional upon the development of homogeneous social labour - which is properly realised only in bourgeois society. Hegel's view of contract, as the meeting of free independent wills, is therefore particular, not absolute.¹

3. Let us now look at the position of Max Weber in regard of the "free" contract. "Freedom of contract", according to Weber, "exists exactly to the extent to which such autonomy is recognised by the legal order."¹ If by this it is meant that "freedom of contract" is a specifically legal notion, that it exists because and so far as it figures as a legal category, then there is nothing to object to. But what are the conditions of this existence? Somehow it appears connected with "the market", i.e. the sphere of property in exchange, for Weber adds:

There exists, of course, an intimate connection between the expansion of the market and the expanding measure of contractual freedom or, in other words, the scope of arrangements which are guaranteed as valid by the legal order or, in again different terms, the relative significance within the total legal order of those rules which authorise such transactional dispositions.²

Again, there appears to be nothing to object to in this statement. A slight suspicion creeps in, however, when we look more closely at what is being said about the apparently historical connection between "the market" and this legal notion of the "free" contract. In fact, nothing is being said in

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1. Weber, Law in Economy and Society, p.100.

2. ibid.

this respect; there is nothing to prevent the connection between "the market" and the "free" contract from being supposed at any time after Mammon or, to be precise, at any time where "the market" is in existence. "The market" appears amidst the most varied of social conditions: it is developed under slavery in ancient times, it becomes the basis of merchant capital in the later Middle Ages, it is developed par excellence, becomes the dominant relation between man and man, under capital and wage-labour in the modern era. But the "free" contract becomes a notion characteristic of the latter conditions alone. Not so for Weber: the "intimate connection" between "the market" and the "free" contract is between two things which "expand". Their connection is purely quantitative: one "expands", so does the other. Hence the use of the merely quantitative terms: "expanding measure" "scope of arrangements", "relative significance"; the mere expression of magnitude here suspends over and over again (regardless of the "in other words", and "again different terms") the nature of

the connection, the thing to be defined.¹

Weber, in fact, makes the assumption that since the "free" contract is a legal notion, we may only understand it legally. Weber is therefore at least consistent this far, since he also systematically prevents himself from defining the thing. If the legal form "freedom of contract" is "intimately connected" with "the market", if the "free" contract is a specifically legal connection of the commodity-exchange relation, then something must make it so. This "something", as we have made clear elsewhere, consists in the specific form of commodity exchange, namely, its generalised form, which is a condition provided only where social production is exclusively production for exchange, where production is capitalist production. These are the conditions of the "free"

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1. "Mathematics usually define magnitude as what can be increased or diminished. This definition has the defect of containing the thing to be defined over again: but it may serve to show that the category of magnitude is explicitly understood to be changeable and indifferent, so that, in spite of its being altered by an increased extension or intension, the thing does not cease to be; a house, for example, remains a house, and red remains red." - Hegel, Logic, p.159.

contract as a legal form. The "free" contract is not something which "expands" alongside the general historical "growth" of commodity or "market" relationships. This is only so once bourgeois conditions have become established, and in any case, even if this proviso is admitted (which it isn't in Weber), the crude quantitative terms in which the connection is expressed still throw it beyond the boundaries of cognition. What is the connection between the legal form and "the expansion of the market"? An "expanding" legal form, says Weber - "the expanding measure of contractual freedom". The connection is quantitative, which is to say, the connection exists. But if two things grow together, "expand" together, become "significant", "important" etc. together, we need to know not that this is so, but why this is so. Accordingly, as Weber persists with these terms the inner connections of the legal form become self-evidently beyond his grasp.

Weber's apparent grasp of the economic connections of the legal form is therefore only this, a mere semblance. Thus,

The present-day significance (sic) of contract is primarily the result of the high degree to which our economic system is market-oriented and of the role played by money. The increased importance (sic) of the private law of contract in general is thus the legal reflex of the market orientation of our economy.

And further,

The exact extent to which the total amount of "freedom" within a given legal community is increased (sic) depends entirely upon the concrete economic order and especially upon the property distribution.²

The "free" contract is pre-posed wherever "the market" has existed. But the "free" contract, like the commodity-form of property ("the market") which is contained in it as a premise, depends upon definite socio-economic relations. Thus, if it is to be found in differing historical periods (which is what Weber commits himself to saying), then those self-same socio-economic relations must prevail in them all - which is clearly not the case.

Indeed, Weber himself is forced into recognising this as he approaches more concretely certain differing historical "contents" which he has initially and uncritically subsumed under the form of the "free" contract. Hence, .

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1. Weber, Law etc., p.105.

2. ibid., p.189.

That extensive contractual freedom which generally obtains to-day has, of course, not always existed; and even where freedom of contract did exist, it did not always prevail in the spheres in which it prevails to-day. Freedom of contract once existed indeed in spheres in which it is no longer prevalent or in which it is far less prevalent than it used to be.

Here even the mere quantitative connection of the "free" contract with "the market" disappears from the scene. As Weber develops his narrative more concretely in looking at historically differing kinds of social relations, e.g. in early Roman times, this economic connection of the legal form slips out of sight - precisely because the "developed" idea he has of it is uniquely a product of bourgeois society and is no longer appropriate, not even as a barren underived quantitative relation. Accordingly, the "voluntary agreement" becomes posited historically as the "status" contract, which becomes gradually and through the ages the "purposive" contract. This historically is the "development" of "freedom of contract".

"In accordance with this fundamental transformation of the voluntary agreement," says Weber,

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1. ibid., p.101.

"we shall call the more primitive type 'status contract' and that which is peculiar to the exchange or market economy 'purposive contract'."¹ That which is "peculiar to the exchange or market economy" is, of course, the "voluntary agreement", i.e. the "free" contract. Nothing is added by calling it "purposive". But it is an absolute impossibility for this same thing to undergo a "fundamental transformation" from its existence as "status" contract. Indeed if anything undergoes a "fundamental transformation", it is no longer that which it was. The "voluntary agreement" is "fundamentally transformed" from itself into itself; the error of historicism. What the "voluntary agreement" is remains completely and utterly elusive.

Let us summarise Weber's errors. First error: the "free" contract is merely a quantitative relation of "the market economy"; as one "increases" in "significance", "expands", becomes "important" etc., so does the other. Logically therefore the "free" contract is posited wherever the rudiments of "the market economy" are in evidence, i.e. anywhere where

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1. ibid., p.105.

man has emerged from the forests and has begun to exchange his products with his fellow-men. Second error, a compound error of the first: the "free" contract is not in evidence as a category of legal thinking in these circumstances. Even in Justinian one will look in vain for the "free" contract. Thus the "free" contract, since it is erroneously pre-posed as something which must exist merely with "the market economy" (regardless of its form), must be considered to exist in such circumstances not as itself, but as something else. The "free" contract becomes the "voluntary agreement", a guileless change of expression for the same thing. A form of voluntary agreement becomes the "status" contract. The "status" contract becomes a general category inclusive of every conceivable form of primitive agreement characteristic of pre-bourgeois social formations. The "free" contract disappears completely - because it was never really made an object of thought at the outset.

4. The quantitative connection between "the market economy" and the legal form of the "free" contract counts merely as an empirical observation.

Theoretically it has the status of a merely analytic proposition: thus the commodity-form, the form of property simply in exchange ("the market economy") is already supposed in the notion of the "free" contract - already cogitated in the subject, as Kant might say. But property is not merely property in exchange, and so something else is also supposed in the "free" contract. In other words, to suppose property in exchange is to suppose property in another connection, a connection in which property in exchange is itself produced as such: property in the sphere of production.

Under bourgeois conditions the commodity-form of property is the capital-form as it pertains to the sphere of circulation. But as such it belies itself; it does not come stamped with these particular origins. The sphere of circulation of commodities in fact appears quite alien to its real nature, i.e. the mechanism which works it. The commodity-form belies its capital-form in which labour-power is systematically exploited in the production thereof. "(T)he capitalist," says Marx,

"again and again appropriates, without equivalent, a portion of the previously materialised labour of others, and exchanges it for a greater quantity of living labour." Thus the process of capital accumulation. Marx continues:

At first the rights of property seemed to us to be based on a man's own labour. At least, some such assumption was necessary since only commodity-owners with equal rights confronted each other, and the sole means by which a man could become possessed of the commodities of others, was by alienating his own commodities; and these could be replaced by labour alone. Now, however, property turns out to be the right, on the part of the capitalist, to appropriate the unpaid labour of others or its product, and to be the impossibility, on the part of the labourer, of appropriating his own product. The separation (from labour) (of property) has become the necessary consequence of a law that apparently originated in their identity.

It is in precisely this way that the legal form of the "free" contract or "voluntary agreement" also becomes more fully developed as its opposite - compelled disagreement. The "free" contract is the legal expression of these same "commodity-owners with equal rights (who) confronted each other...", but its necessary consequence becomes the containment of disagreement.

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1. Marx, Capital, Vol. 1., p.547.

Perhaps a few words about this "containment of disagreement" are necessary. Firstly, it is to be emphasised that our dealing with the "free" contract is a dealing with a form of modern law, that is to say, not as the law of contract as a specific branch of legal doctrine, but as an abstraction of the form of law as a whole, as a historically more "positive" expression of the role played by the old social contract (which didn't need to be "positive" since, unlike this, it conformed with the scientific protocols of its day). Secondly, the "containment of disagreement" which this passes into, therefore, is a containment in general - not a reconciliation of an individual breach of contract, but a containment of class divisions within society as a whole. The "free" contract is an abstract expression of legal language as a whole, a category within the legal language of equality. It therefore operates in the same contradictory way as this language generally, namely, under the auspices of power (as outlined in Pt. I, Chapter 111). In speaking "freedom", therefore, the law's aim is just the opposite - constraint, not for freedom's sake, but for the sake of the property relations which it belies as a theoretically personified embellishment of the commodity-form of property.

5. The merely empirical connection of the form of law with "the market" is very much "old hat". It is to be observed in Carlyle, for example, who saw the new equality of law ushered in and proclaimed by the French and other less dramatic bourgeois revolutions as coincidental with cash payment becoming increasingly the only remaining social nexus between man and man. The legal historian, Maine, with none of the same talent, observed the replacement of all hitherto existing forms of social bondage by the relation of "free" contract. And the more recent historian, Tawney, tells us that with the eclipse of the ancien regime:

All men, at least in theory, become equal before the law...All men may enter all occupations. All men may buy and sell, trade and invest as they please. Above all, all men may acquire property of all kinds. And property itself changes its nature. The element of sovereignty in it - such at least is the intention - vanishes. What remains is the right of exclusive disposal over marketable commodities.

Here the commodity-connection of the legal form is sketched out. But it is still only a legal view, since the commodity-form is posited as the only form of property. "(A)ll men may acquire property

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1. Tawney, Equality, p.96. On Maine cf. post.

of all kinds" - this is not so. The worker, *ceteris paribus*, cannot become an owner of capital; the condition of capitalist ownership is that the mass of people are systematically prevented from becoming owners of the means of production and hence purchasers of labour-power and appropriators of surplus-value. That form of property which "all men may acquire" is property in exchange, commodities, and "property of all kinds" does, indeed, take this form at one time or another. But it by no means follows therefore that "all men may acquire property of all kinds" - not even "in theory at least", because it is a theoretical condition that "all men" do not have the means of acquiring "property of all kinds", regardless of its necessary appearance at some time or other in the sphere of exchange. The labourer, for instance, cannot be a purchaser of another's labour-power.

It does absolutely no good to merely point to the existence, true though it is, of the commodity-connection of the legal form; for, it is precisely the commodity-form of property which belies its real (capitalist) inner nature. There

is no need to go into this any further since we have considered it elsewhere (especially in Pt. I Chapter 11). But it is symptomatically here, at the commodity-connection, that the empiricist historians and sociologists (Tawney, Weber etc.) come to a complete impasse. It is just at this point where it is generally forgotten what the relation in question was about, namely, a definite set of socio-historical circumstances in which law appears as a reflex of market conditions. Accordingly, the "origins" of this legal form become rooted out elsewhere - especially in Rome. This brings us to the subject-matter which we shall now deal with: Rome, where the commodity-form was developed quite independently of the specific connections peculiar to its modern socio-legal character, where the commodity-form was developed according to an altogether different mode of social production. Similar kinds of "origins" are also dredged from the feudal era, a matter which we shall also consider. Both cause and effect of these misplaced "origins" of the modern legal form is that it is never fully grasped in the first place and remains in the same state of mystery at the end of it all; it remains as it started, an underived commodity or "market" connection.

"Origins" and the Legal Form

1. Roman law and the idea of its "reception".

We showed in the last section how the commodity connection distinguishes hardly anything in respect of the form of law. This is so at least in so far as the material basis of such a connection is left out of the reckoning, in so far as it remains a merely empirical, quantitative or analytic observation. Further, it is as such, i.e. as a merely empirical, quantitative etc. observation, that it becomes the basis for postulating the sameness of law in the most diverse of historical circumstances and conditions.

The commodity connection is evident, for example, in the ancient Roman form of contract *per aes et libram* which appears as early as the 4th century B.C. Legal transactions *per aes et libram* (through copper and balance) related to property in exchange. But the form of property in exchange here is a relation of slavery. The *mancipatio*, with which these transactions were primarily associated, was a mode whereby slaves, land and cattle (*res mancipi*) were exchanged. The slave appears here, himself, as a commodity. On the other hand, the slave as property in use becomes the producer of

of property in exchange and is therefore, objectively, the producer of himself, i.e. as a slave. As we made clear in part I, commodities and money in Roman times could only figure as such, as value relations, because and so far as they were posited by slave production. It can only have been the labour of slaves therefore, which rendered copper as a universal equivalent in those very early times. Hence, when a slave, a piece of land, cattle etc. exchanged for such and such an amount, that quantity could only be on average a portion of materialised slave labour. Thus on either side of the transaction per aes et libram we would have, say, a slave on the one side and a quantity of copper on the other. On each side we would therefore have, materially, the slave-labour which a. the slave embodied, in, for instance, the slave-produced grain etc. which he had converted into bone, muscle and so forth, and which b. the copper embodied, in its having been mined by slaves.

Per aes et libram means, implicitly, a form of transaction grounded in slavery. Moreover, the same is true of the later Roman contractual forms, regardless of their having been cleansed of the ritualistic elements characteristic of much earlier times. In

this connection, Maine, despite an earlier warning that, "the mistake of judging the men of other periods by the morality of our own day has its parallel in the mistake of supposing that every wheel and bolt in the modern social machine has its counterpart in more rudimentary societies," senses no such "mistake" when he says a few pages further on, with Roman developments alone in mind:

The transformation of (the) ancient view (of contract) into the familiar notion of contract is plainly seen in the history of jurisprudence. First one or two steps in the ceremonial are dispensed with; then the others are simplified or permitted to be neglected on certain conditions; lastly, a few specific contracts are separated from the rest... the selected contracts being those on which the activity and energy of social intercourse depend.

Here, "the familiar notion of contract" is arrived at purely through a documentation of specifically Roman developments. By the time Maine has arrived at the "consensual" contract *juris gentium*, he has somehow arrived also at the modern form of "free" contract; for, he says of the former:

The motion of the will which constitutes agreement was now completely insulated, and became the subject of separate contemplation; forms (he means the older ritualistic and cumbersome forms) were entirely eliminated from the notion of contract, and external acts were only regarded as symbols of the internal act of volition.²

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1. Maine, *Ancient Law*, pps. 325, 327.
2. *ibid.*, p.346.

All that is posited by the "internal act of volition" here is the exchange form of property, property as an object in exchange. In other words, all Maine expresses is the sameness of the Roman form on the basis of the commodity connection alone. But the commodity form supposed in contracts juris gentium is just as much a relation of slavery as in the case of the foregoing example of the transaction per aes et libram. And apart from this, the idea of simply an "internal act of volition" is quite alien to the Roman jurists, since there was no abstract willing subject capable of being produced, as a legal conception, under slavery. What Maine effectively does is to covertly slip the "familiar notion of contract" into what he understands as the Roman form. The net result is that neither the "familiar notion" nor the Roman form are properly grasped in their real connections. How the "internal act of volition" wills a relation of capital and wage labour in the one case and a relation of slavery in the other, Maine, needless to add, does not say.

It is, of course, the "free" contract which Maine reads into the contract juris gentium. The source of the error is that the "free" contract is a

relation not of commodity exchange per se, i.e. not of the historically general existence of commodity exchange, but of the historically specific existence of generalised commodity exchange. In thinking otherwise, Maine commits himself to the view that either the "familiar" contract is a relation of slavery or that "every wheel and bolt in the modern social machine has its counterpart in more rudimentary societies." Similar errors arise in connection with the idea of the "reception" of Roman law, and to this we may now turn.

It is quite strange that the idea of the "reception" of Roman law into modern legal institutions has attained almost the character of a statement of fact for modern legal thinking; for, even without much further thought about the matter, it poses the most elementary of logical problems. Roman law supposes the conditions of Roman law. If Roman law is "received", then so also must its conditions be similarly "received" - which is not the case. Therefore the "reception" of Roman law is not the "reception" of Roman law.

Weber, for example, says:

Among the ancient jurists, as a result of the historically conditioned analytical nature of Roman legal thought, properly "constructive" ability, even though it was not entirely absent, was only of small significance. Now when this law was transposed into entirely strange fact situations (!), unknown in antiquity, the task of "construing" the situation (in the "strange fact situations") in a logically impeccable way became almost the exclusive task.

"In this way," Weber adds, as if he had explained something, "that conception of law which still prevails to-day and which sees in law a logically consistent and gapless complex of 'norms' waiting to be 'applied' became a decisive conception for legal thought." "In this way," as a matter of fact, "that conception of law which still prevails to-day" is completely and utterly mystified. Firstly, in Roman times legal "'constructive' ability", Weber correctly observes, is "historically conditioned". The "'constructive' ability" of Roman legal thought, in other words, is a child of its time. This is a condition of its nature as specifically Roman legal thought: it cannot "construct" as modern law because it is not materially furnished with abstract personality; it "constructs" therefore on an altogether different basis. Consequently, it is quite erroneous to go

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1. Weber, Law etc., p.277

on and say that, "this law was transposed into entirely strange fact situations," (by which is meant primarily bourgeois "fact situations") because "this law" logically entails specifically Roman "'constructive' ability". If Roman "'constructive' ability" is "transposed...(etc.)", then by that very act it is no longer distinctly Roman, because what originally distinguished it was the fact that the conditions for such a development, for becoming un-Roman, were logically antithetical to it.

Roman constructive ability (there is no real need to have inverted commas around it - Weber's use of these is symptomatic of the erroneous attempt to give it a dual meaning) is a relation of slavery. This is its differentia specifica. Accordingly there is no abstract subject in Roman law; there is no material basis for such a thing as a self-sufficient legal category. The legal subject here is not abstract as a subject, but as a freedman, a Roman citizen and so forth.¹ The entire ground and foundation of Roman legal abstraction is the

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1. cf. Justinian, Institutes, Bk. 1, titles 3-8.

slave system which pre-determines the height, limit and form of all its constructions. Hence Roman law is no more "received" in modern times than the system of slavery.

Historical inquiry into the "reception" of Roman law, in so far as it is bent upon upholding the implied thesis, naturally has a self-defeating character about it. For, the more the matter is gone into, the more it transpires that Roman law is just and precisely that, i.e. Roman law, the law appropriate to specifically Roman conditions.

"once the origination of an institution has been shown to be wholly to the purpose and necessary in the circumstances of the time," said Hegel, "the demands of history have been fulfilled."

Hegel also had the historicist error in mind, for he adds to this:

But if this is supposed to pass for a general justification of the thing itself, it turns out to be the opposite, because, since those circumstances are no longer present, the institution so far from being justified has by their disappearance lost its meaning and its right.

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1. Hegel, Philosophy of Right, p.17.

Indeed, as Weber and others talk about the "reception" of Roman law, they fail completely to "justify" the form of law which they have in mind, i.e. bourgeois law, for their mode of "justification" or reasoning here, in persisting with connections of a legal form grounded in slavery and long since passed away, does just the opposite. In this connection, popular criticism (of Weber especially) which points to "bourgeois apologetics", "justification of status quo" etc. etc. needs to think again.¹

Naturally as Roman law transpires increasingly as something essentially connected with Roman conditions, it correspondingly becomes increasingly alien to the form of modern law - and the grounds of the "reception" argument must accordingly be modified.

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1. Marxist criticism of Weber is often vulgar: Weber becomes here the embodiment of "self-evident" falsities such as "Kantianism" (cf. ante), "liberal nominalism", "value-freedom", "empiricism" etc. etc. On the other hand, "sociological" adulation of Weber with the most inappropriate of phrases and descriptions: "rigorous", "profound", "genius", "the answer to Marx", "Marx's intellectual equal" (to be found in most sociology textbooks - even the best, cf. Giddens, Capitalism and Modern Social Theory) - all this is equally vulgar if not more so.

Such modification, however, doesn't alter the theoretical error; it merely disguises it. Thus the following is generally accepted: of course Roman law is not received in complexu, only certain of its elements - or some such argument of the kind. In Weber, for instance, the elements "received" turn on the "logical", "formal", "rational" etc., characteristics of Roman law. Here is an instance:

As Ehrlich has properly emphasised, in order for them to be received at all, the Roman legal institutions had to be cleansed of all remnants of national contextual association and to be elevated into the sphere of the logically abstract; and Roman law itself had to be absolutised as the very embodiment of right reason. The six centuries of civil law jurisprudence have produced exactly this result. At the same time, the modes of legal thought were turned more and more in the direction of formal logic. The occasional brilliant aperçus of the Roman jurists ...were torn out of the context of the concrete cases of the Pandects and were raised to the level of ultimate legal principles from which deductive arguments could be derived.

But then, after six hundred years or so since the early glosses of the twelfth century, after all this so-called "cleansing", stripping and tearing from context etc., the question must arise as to what is particularly Roman about the result. The impression given by Weber is that there is something implicit

1. Weber, Law etc., p.276-7.

in the Roman form which over the ages has rendered itself capable of extrapolation, "cleansing" etc. (this latter term is a typically German piece of arrogance in this connection). In other words, we have here just another re-statement of the historicist error: the modern form is covertly pre-posed in the ancient, but here it is dormant, latent, unrealised (in fact, not there at all); however, thanks to the juristic labours of almost two millenia, the thing emerges fully fledged, completely "unfolded" in modern (but especially the German variety) legal science. German legal science: a sealed gift from Rome that had taken almost two millenia to uncover. This at least was the message of the pandectists of the Historical School - in no uncertain terms. But for Weber, "Kantian" that he is, this must be given the blessing of reason itself. The sealed gift is therefore the "rational" or "logical" elements contained within Roman legal thought, and, not surprisingly, the perfect embodiment of rational legal thought is that body of doctrine developed by the modern (especially German) pandectist civil lawyers:

Savigny, Windscheid, Puchta, Unger etc.¹

But what does it mean to say that modern law has "received" the "logical", "rational" etc. elements of Roman law? By the same token present-day cuisine has "received" the logical elements of ancient Babylonian cookery, present-day mathematics has "received" the logical elements of Aztec construction, and so on and so forth. Logic, since its form is universal, is "received" by everything at all times in all places.²

The "reception" of Roman law is basically a historicist error. In Weber it is disguised with a little "Kantianism" whereupon it appears in the form of a "reception" of law as rational thought. Still, the underlying historicist error by no means disappears with this much-abused sleight-of-hand trick. In comparison with the naiveities of the old Historical School, the modern legal form is

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1. cf. Ehrlich, Principles of Sociology of Law, p.319 et. seq., where the Roman connections of these thinkers appear much less mysterious than in Weber.
2. In any case, as Hegel once had cause to point out, it was to a considerable extent by dint of their being illogical, that the Roman jurists and praetors achieved their high distinction as legal thinkers; by considering, for example, that a filia was a filius in regard of the twelve tables, and so forth. cf. Hegel's discussion of Hugo's "Lehrbuch", Philosophy of Right, p.20.

here just as much covertly presupposed, in fact much more covertly presupposed, in the ancient form. The only difference is that now the legal form is no longer a principle of equality, but rather a rational technique in the application of "norms" to "fact situations".

Quite apart from the fact that "rationality", "logical form" etc. can be abstracted from literally anything, and can therefore connect literally anything together (obviously at the most indifferent and superficial level - at the analytic level of mere being, to give it its precise philosophical expression), there is still the question as to why so many hundreds of commentators have persisted with the idea of the "reception" of the Roman into the modern legal form. The basis of this is the commodity-connection of the legal form which is clearly apparent in both bourgeois and later Roman law. This, at any rate, is the basis for the association in modern times (in Maine and Weber, for example). But the whole issue is easily confused by the immensely complicated historical developments connecting Roman and feudal law - which is an entirely different matter. Generally these developments have much to do with the position of the Roman church throughout the Middle Ages. The

The first "reception" of Roman law thus occurs in Italy and Southern France around the eleventh and twelfth centuries, at which time the first glosses are made upon the Roman sources. But the practical application of Roman law under feudal conditions was impossible, and the medieval jurists in effect were set with an unworkable forced error at the hands of the Roman church. The inevitable result was that Roman law, so far as it became anything other than an esoteric pursuit, became feudalised, i.e. no longer Roman law but feudal law in Roman style. The material basis of this subsists in the antithesis of property relations arising from slavery on the one hand, and property relations arising from the feudal system of land-tenure on the other. Ehrlich shows a sense of this when he says:

At the time of the (medieval) reception, irresoluble questions..cried out to the Continental jurists from every line of the corpus juris. Had they been men of scientific training, let us say of the Historical School of Savigny or of the modern sociological school (sic), they would never have undertaken this task (of applying the Roman sources). They would have said to themselves at the outset: The kind of ownership that the sources speak of does not exist among us; the unfree person that we are dealing with is not the Roman slave.

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1. Ehrlich, *ibid.*, p300

Why the bourgeois "reception" should be any less contradictory, "scientific" no less, Ehrlich does not say. But we have seen how "scientifically" the Historical School "receives" its Roman law, namely, on condition that the latter is first made the disguised embodiment of the bourgeois principle of right; in other words, with a not dissimilar "scientific" spirit from that of the medieval jurists who in their day dredged from it similarly impossible principles of feudal right.

There are two "receptions" of Roman law: the medieval and the bourgeois. They are, in their completely different ways, equally contradictory affairs. This is because the property relations of bourgeois society (wage labour, capital - generalised commodity-ownership etc.), of feudal society (feudal land-tenture) and of ancient society (slavery) all correspond with very definite and specific forms of law that are inextricably bound up therewith. History, however, isn't as clear-cut as this, and one especial confusion over the "reception" may be illustrated in this connection. It concerns the uneven development of societies. In the seventeenth century, for example, Holland is taking great steps towards

maturity as a bourgeois society, whereas Germany is still, quite definitely, feudal. The Dutch jurists are therefore working upon the Roman sources from a bourgeois standpoint while their German counterparts are still involved with the distinctly medieval *usus modernus* of the Roman pandects. It is only in the nineteenth century that the Germans begin to consider Roman law in anything resembling a distinctly bourgeois connection, whereupon the older medieval conceptions of the *usus modernus* are vigorously repulsed for their "unscientific" character. Corresponding with this, the German Imperial Code at the end of the nineteenth century systematically overrides a whole mass of medieval "Roman influences" within the old common law. Sohm expresses the belated arrival of the new bourgeois notion of the "reception" when he says of this code:

In the code all regulations focus in the private individual, considered in the abstract. It deals with property, family and inheritance. Not the farmer nor the nobleman is considered; only the legally eligible subject, the abstract unit of the *jus gentium* being here in evidence. This unit or person appears in but one capacity - either as creditor or debtor; and this conception may be truly said to embody the highest ideal of the merchant.

1. Sohm, *Institutes of Roman Law*, cited in Lee's *Historical Jurisprudence*, p.415.

A distinctly bourgeois code: "the private individual considered in the abstract", namely, as the owner of property in exchange - a result of generalised commodity-ownership. But as quick as lightening this commodity-connection is swept back to Rome, generalised commodity-ownership becomes conflated with commodity-ownership in general, "the abstract unit of the jus gentium (appears) in evidence". Thus the bourgeois "reception" of Roman law: basically the historicist error, a mode of expressing complete indifference to the form of commodity-ownership and thus the form of law also, both Roman and modern.

To repeat: the commodity-connection of the persona juris gentium is a relation of slavery; this "abstract unit of the jus gentium" is conditioned in form and content by slavery, just as was the development of the exchange economy upon which it arose as a legal form. As we remarked in Chapter II, (part the development of exchange relations here is in contradiction with its basis, because the rational and unhindered development of exchange demands the equalisation of human labour. Slavery becomes the irrational limit to any further development of the productive forces actuated thereupon, and the historical

result of this contradiction between the relations and forces of production is the eventual disintegration of the Roman Empire. This, furthermore, is the secret behind the much-observed but little-understood struggle between imperial law and the *jus gentium* in the later Empire. The *jus gentium*, or "law of nations" is the legal form of the expansion of these productive forces on the surface of exchange; hence, almost all contracts are *juris gentium*. It is this legal form which increasingly "sees no reason" in slavery, which is the fetter upon the social development of the economic relations upon which it arises as a legal form. It is therefore a threat working under the very foundations of the Roman imperium. No slavery, no ancient civilisation. And imperial power accordingly (more or less unconsciously) struggles to contain the "law of nations".

But to return to our main point, the latent demand for "individuality" to which the development of the *persona juris gentium* bears witness, has nothing to do with "concealed" bourgeois individuality; it is a symptom of the impending fortunes of slavery and the Roman imperium. The *persona juris gentium*

is no less a relation of slavery for the fact that it is a contradiction within itself. The "abstract unit of the jus gentium", to use the words of Sohm, is a legal relation of slavery and is no more "in evidence" in the modern legal form than is the slave in the modern factory or the Roman centurion in the modern army. In the juridical vein, which guilelessly constitutes a "reception" of Roman law here, it is "inadmissible evidence".

In summary, the Roman "origins" of the modern legal form are constituted on the basis of a historicist error, basically the error of conflating the legal evidence of generalised commodity relations with the legal evidence of commodity relations in Roman times (i.e. commodity relations in general). This, schematically at any rate, is the mode upon which the modern "reception" is articulated. It is, of course, a product of bourgeois society and thus becomes distinguished historically from the medieval "reception" as bourgeois legal relations begin to emerge in the general transition from feudalism to capitalism. But to view the bourgeois "reception" as "scientific", "rational" etc. on this account

(as do Ehrlich and Weber, for example), i.e. in mere contradistinction from the overtly irrational medieval plagiarism of the Roman sources, in other words merely "because it is bourgeois" (if the expression may be permitted) - this just glorifies the historicist error. And it is really hardly any better than the commonplace historical descriptions of the "reception" that do not even bother to distinguish the medieval from the modern in any shape or form, that describe an uninterrupted continuum beginning around about the time of the re-discovery of the Justinian Digest at Almalfi in the twelfth century and proceeding through the various glosses and "applications" in the feudal era, and then, as if the exact "same thing" is at work, to the blossoming of Romanism in the works of the great jurists in Holland in the sixteenth century, Scotland in the seventeenth century, France in the eighteenth, Germany in the nineteenth and so on and so forth. But having got at the essential elements of the Roman "origins" of modern law, we must now pass on to other matters.

"Status" distinctions

The "origins" of the modern legal form, it should now be apparent, reside in modern society and nowhere else.¹ We have concentrated so far primarily upon ancient "origins" in this connection, but it would not be merely for the sake of symmetry, to look briefly at the possibility of feudal "origins". Unlike the case of the Roman form, there is no notion of the "reception" of feudal law into the

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1. Ehrlich summarises his Principles of the Sociology of Law in the following sentence: "At the present as well as any other time, the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself." - foreword, *ibid.* It is a pity that Ehrlich didn't notice the extent to which "juristic science" encroached upon the domain which he marked out as the sociology of law, throwing his investigations well outside this gravitational field. Of course, to make statements about the social character of law just in so many words is a very easy thing to do, whereas to remain consistent with this principle is an altogether different matter. Such a consistency, needless to add, requires a recognition of the cardinal "juridical sins" all of which promote the apparently ahistorical character of law in an innumerable variety of disguises - in general they are (methodologically speaking) the "sins" of "Kantianism", historicism, etc., but it must be remembered that it is also easy to say this "just in so many words".

modern legal form; but there is a popular notion which connects the feudal with the modern (yet not in so many words, since the feudal form is never properly distinguished, as it ought to be, from the ancient form in this connection), it is the idea of the development of law from "status" to contract. We shall first consider the kinds of connections that are implied by this idea as it was initially expounded by the legal historian, Maine. And secondly, more importantly, we shall consider the real connections of status law proper, namely, not as a connection of the modern legal form, but as the form of law of feudal society.

It was the legal historian, Maine, who popularised the idea of "status to contract" as a description of the historical development of legal relations.

He says:

The movement of progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The individual is steadily substituted for the family, as the unit of which civil laws take account...Nor is it difficult to see what is the tie between man and man which replaces by degrees the forms of reciprocity in rights and duties which have their origin in the family. It is contract. Starting, as from one terminus of history, from a condition of society in which all/

all the relations of persons are summed up in the relations of the family, we seem to have moved steadily towards a phase of social order in which all these relations arise from the free agreement of individuals... (W)e may say that the movement of progressive societies has hitherto been a movement from status to contract.

Again, pre-capitalist society (Maine never bothers to distinguish any particular pre-capitalist social formation in this connection) figures merely as something upon which the modern might be articulated. The only difference is that whereas here we have the individual, there we have its opposite, the group, the family. But even this is hardly a difference, since the individual here is the expression of a group in being "the unit" of which civil laws take account", and by this same token, the family becomes conceived under the legal form of individuality. In any case, if we look at the most important older legal forms, the contract juris gentium for example, there is nothing of the "family" in it. Even in the case of the paterfamilias, the Roman legal unit subsuming all that was contained within the familia (slaves, children etc.), its basis is not the "family" but the economic system upon which the familia, as such, arose, namely the slave system, the "origin" of the Roman legal form in general.

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1. Maine, Ancient Law, p.172-4.

Maine connects "status" and "contract" in a journey-like fashion. The connective, which places them at opposite ends of the same road, as it were, is that they both similarly express the "tie between man and man", that is to say, they both express this thing legally. Still, every legal expression is of a "tie between man and man" in one way or another, and so the connective boils down to the fact that both "status" and "contract" are categories of law, which is only a sufficient reason for being a connective in so far as it is the same law which is under consideration. In Maine this is the case. For, he is talking all the time about bourgeois law, while giving the impression that he is talking about just the opposite. Hence, in talking of "status" he really talks about "contract". In this way, "status" figures as a "form of reciprocity in rights and duties", a "unit of which civil laws take account", a "tie between man and man" - terms which can describe the modern form and the modern form alone. The "status" relation can have nothing to do with "reciprocity" (mutual give and take), cannot possibly figure as a legal "unit" implying the relation of equality, the relation of merely "man and man". This is the form of contract, i.e.

of the modern legal relation. Maine's celebrated "status to contract" is, in fact, contract to "status" and back again.¹ In other words, the modern form, which is all about "contract", "reciprocity",

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1. "Maine's now celebrated dictum as to the movement from status to contract," says Pollock, who wrote some notes to Maine's book, "is perhaps to be understood as limited to the law of property, taking that term in its widest sense as inclusive of whatever has a value measureable in exchange" - *ibid.*, p.183. Pollock, however, did not mean here that Maine's "status to contract" was nothing more than a historicist embellishment of generalised commodity-relations. His objection was rather that Maine had considered his "status to contract" in relation to the legal form of "persons", i.e. the "individual", "man and man" etc. - forgetting, of course, that the legal form of "persons" here is, precisely, the legal form of property in exchange. But Pollock, whose gaze focused backwards to the tradition of Coke, Bracton and Blackstone, found any number of "bourgeois" developments distasteful - the erosion of the old doctrine of privity of contract, for instance, and, in the present case, the idea that the legal person reduced itself to a matter of contract. "The law of persons", he says, "may be and has been cut short; but so long as we recognise any differences at all among persons we cannot allow their existence and nature to be treated merely as a matter of bargain." - *ibid.* Sentiments worthy of a knightly champion of the common law: *Honi soit qui mal y pense.* cf. Sir F. Pollock and F.W. Maitland, *History of English Law.*

"man and man" etc., in a word, a generalised equivalent form, automatically posits its opposite as "status" or, at any rate, a relation of inequality, privilege, distinction etc. But as soon as this opposition, this "status", is formed, it is made to return to that which initially posited it as a merely negative reflex of itself, namely, the modern form. Thus "status", having never really been anywhere outside the modern form, returns to contract; it becomes a form of "reciprocity", a relation of "man and man", an abstract "unit" of legal thought etc. But we know that this language of equality has just the opposite of the "status" relation in mind. Hence, Maine's thesis in truth is not "status to contract", but "status-as-contract" - a purely imaginary historical journey, since "status" never really leaves contract. "Status to contract" is just a superficial appearance of contract posited as self-reflected opposition, journeying back to itself, reaffirming itself by seeing only itself in that to which it is opposed.

But before he turns "status" into contract, Maine at least brings out first of all that which the form of contract itself tells us (at the merely

analytic level), namely, that contract opposes "status". Or, more generally, equality opposes inequality. Maine, of course, then proceeds to try and refute the analytic proposition here (a sheer impossibility since analytic propositions are always true), i.e. by turning "status" (inequality) into contract (equality - "man and man", "unit" of law etc.). Departing from the analytic principle in a more appropriate direction, we get the following general historical proposition: "status", so far as law is concerned, is firstly a mark of pre-capitalist law (Maine, of course, can only imply this, whereas by turning "status" into the form of contract he contradicts this implication). Still, this distinguishes very little. Left here, "status" becomes applicable to totally different forms of law - ancient and feudal law for example. Indeed, at this level of indifference, "status" may be deemed applicable to bourgeois law, to isolated instances such as diplomatic immunity, parliamentary privilege, or even the legal distinctions that are made on the grounds of sanity, age and so forth, which are all "status" distinctions of one kind or another that are recognised in modern law. Clearly we have not departed very far from the analytic principle with this minor development of the historical sense of "status."

1. Regarding bourgeois society, ancient society etc. it needs hardly be said that we have always supposed primarily only the abstract average conditions behind their respective systems of property relations. Thus in connection with ancient society we mention primarily the slave and his master, even though empirically a whole host of further distinctions may be made. The same is true in regard of the wage-labourer and the capitalist in bourgeois society, where clearly not everyone is either a wage-labourer or a capitalist. These class relations (master/slave, capitalist/wage-labourer) are nevertheless the scientific indicia around which the respective systems of property relations (hence law) are established. Similarly, the abstract relation of lord and serf in regard of feudal society, with which we are now dealing, is naturally an abstraction. Still, it is of no less value for the fact that feudal society is par excellence the ground of innumerable class distinctions, for this manifold nevertheless coalesces around either the abstraction of serf or lord.

"In England, modern society is indisputably most highly and classically developed in economic structure. Nevertheless, even here the stratification of classes does not appear in its pure form. Middle and intermediate strata even here obliterate lines of demarcation everywhere ... However, this is immaterial for our analysis." - Marx, Capital, Vol. 111, p.885.

"Status", if it is to become a scientifically reputable socio-legal category, must be grounded in a definite form of law. The ground of status law (to relieve it from its inverted commas) is feudal society.

Status law is a relation of lord and serf in the same abstract way that Roman law is a relation of slavery and modern law a relation of capital and wage-labour. Status law is the legal reflex of the feudal system of landed property. Let us see how this connection comes about.

Feudal society is articulated around a distinct mode of production, a distinct system of property relations. It is based neither upon slavery nor capital and wage-labour, even though villeinage often approached the condition of slavery and worse, and quite regardless of the fact that "free" hired-labour was not uncommon as well as large accumulations of merchant capital (especially in later feudal times).¹

Under feudalism the serf, unlike the wage-labourer under modern conditions or the slave under ancient conditions has a property-right in a portion of the means of production. The serf is neither owned

as a means of production (the case of the slave), nor is he completely separated from ownership of the means of production (the case of the "free" wage-labourer). The peculiar relation of the direct producer to the means of production in feudal society, as is the case with all societies, determines the specific social form of property in that society and therewith its form of law. In bourgeois society this relation is one of complete separation of the direct producer from ownership of the means of production; the wage-labourer must therefore sell as a commodity his ability to create value to the owner of those means; the capital-form of property here appears in the form of generalised commodity-ownership, and the specific legal form which arises thereupon appears as an abstract subject, and so forth - these connections, we have, of course, dealt with in detail elsewhere. Similarly, in Roman times this relation of the direct producer to the means of production consists in the direct producer being owned as a means of production, i.e. as a slave, and this in turn posits the form of Roman law - connections which we have also dealt with in detail elsewhere. Similarly again, in feudal society, which we have

not said a great deal about, the relation of the serf to the land, the specific conditions of this relation, determines the form of law here - status law. We shall now give an outline of these connections.

The serf has a right to a portion of the means of production (his strip of land, for instance) on condition that surplus-labour is performed by him for his lord (in one form or another: but, as we have already noted, we are dealing here with an abstracted average set of conditions in regard of feudal property relations). Having a right to property, the serf naturally becomes recognised as a person in law; but having the right to property in this particular way, namely, on condition that he works, for example, three days on his own land and three days on his master's (resting on the seventh), means that, as a legal entity, he is not the same as his master. As a legal entity, the serf is unequal with other legal entities. In other words, the form of law is status law. The serf has his rights and duties, and the master has his, and their different status as legal entities is directly reflected in feudal law. This, it is

crucial to point out (especially to English legal historians), is not because one is landlord and the other tenant in the sense of the modern landlord and tenant agreement. The feudal form is completely and utterly different on account of the specific form of property underlying it. The modern landlord and tenant are not differing types of legal person; their distinction, which is made for obvious technical reasons, is made on the basis of their fundamental equality as legal persons and has nothing to do with status distinction. It is only the feudal property relation which is reflected as status law, as a heterogeneity of separate right-holders. Roman law has nothing of this because the direct producer, the slave, does not need to be considered as a legal person. Modern law has nothing of this because the direct producer, the wage-labourer, is considered as an equal with all others as a legal person.

The serf is distinguished from the slave in that he is a person in law, and from the "free" wage-labourer in that he is an unequal person in law. This, schematically, is how feudal law is to be distinguished as specifically status law. Before we look at this matter in a little more detail,

it is to be pointed out that this is no mere quibble about the use of the word "status", yet nor does it seek to be dogmatic about the use of this word in connection with legal matters. Indeed, it is quite sensible to want to say that the Roman citizen had a special "status" in Roman law, or that the member of parliament has a special "status" on the floor of the house of Commons in having a certain immunity from libel laws in this connection, and so forth. But then, the word "status" here is only of descriptive weight and has no theoretic bearing so far as the form of law is concerned; hence the form of privilege-right in question is never distinguished from one case to the next by calling then all instances of "status" law.

Let us say a little more about the social form of property under feudal conditions. The serf has property in land on condition that he performs surplus labour for his master. Surplus and necessary labour, as Marx often used to point out in contradistinction from the capitalist mode, are here separated in space and time. That which the serf produces for himself on his own piece of land, i.e. his means of subsistence, is clearly and distinctly separated from that which he produces for his master on his master's estate. The relation of exploitation is therefore quite explicit; the serf must produce

not only for himself, but for his lord too by
viture of the latter's monopolistic position in
relation to the conditions of land tenure. The
lord, really, is the law. And on the business of
the serf's legal rights it is to be pointed out
that, although certain forms of action were
available to him if the lord treated him "wrongfully",
such evidence must be treated with far more caution
than is characteristic of the legal history books.¹
The fact that the feudal lord was often effectively
the arbiter of right and wrong, that he presided
over his own court of law, that he had God on his
side, that he had a monopoly over the means of
physical coercion amongst other things (e.g. his
ownership of the mill for the grinding of corn)
- all this tends to be overlooked by the legal
historians who think that they get at the real
character of feudal law by fastidiously poring over
the forms of action written down in Glanvill.
Indeed, had the various rights of the feudal tenant
vis à vis his lord been so significant, there
could have been no general historical expropriation
of the peasantry (which occurred at different times
and in different ways in all the modern capitalist

1. cf. Maitland, Forms of Action etc. and, more
recently, Milson, The Legal Structure of
Feudalism.

nations); hence no creation of a mass of "free" wage-labourers, no transformation of merchant capital into industrial capital, no growth of the towns and cities, no eclipse of feudalism, in a word, no modern society.

This latter point brings us to something which is rather important in regard of the heterogeneous character of feudal law. For, the natural economy of feudal society, i.e. the simple relation of lord and serf to the land, is as we have already noted, an abstraction of the form of feudal society. This relation does not exist in the towns and cities. Accordingly, the development of the towns, urban development in general upon the basis of manufacture, handicrafts etc., is a development which eventually stands in an antithetical position in relation to the feudal system as such which is based upon agriculture. Let us illustrate what this means.

The towns are the centres of commercial activity, of the production of luxury and other goods circulated by the capital of the merchant. But production here is still in the hands of the guildmaster and his journeymen, who are craftsmen owning their own instruments of production and bound together in a

caste-like manner. As such the guild-system poses no threat to dominant system of feudal property in land, since the capital of the merchant can only purchase from the guildsmen their products, but not the guildsmen themselves nor their instruments of production from which they are inseparable. The strict regulation of the guild-system, which becomes one of the heterogeneous elements within feudal law as a whole, thus limits the scale of production. The merchant or usurer who has accumulated a considerable amount of money cannot simply assemble together the instruments of production under one roof and invite the skilled craftsmen to come along and start producing for him. The guilds have first to be broken up. Such a process corresponds with the expansion of production, the growth of the urban areas, the ruin of the feudal landlord who falls within the clutches of the usurer because the surplus which the former extracts from his serfs cannot compensate for the new consumption levels to which he has become accustomed as a result of this general expansion of production. As the guilds become a fetter upon the development of manufacture, so the feudal system of land tenure becomes a fetter

upon the production of agricultural goods. As the feudal land-owner becomes increasingly discontented with the living provided for him by his serfs, as he becomes increasingly the market for the various luxuries that are brought his way by the merchant who is encouraging at the same time the break-up of the guilds and the general expansion of production in the urban areas, as all this is taking place, this same land-owner must "rationalise" his own methods of production to compensate, i.e. he must become more oppressive, must extract more surplus from his serfs.¹ But this is not enough at a certain stage: where the commutation of specific services into money payments is not feasible, the landowner begins to throw his peasants off the land in order to meet the productive levels that are being set for him in the towns and cities. At the same time, the peasants who are expropriated drift towards these towns and cities and form a readily available source of "free" labour

1. Empirically this process would gather momentum such that the lowest classes of the feudal order feel the oppression worst: The lord would become more oppressive upon his vassals, who in turn would pass the buck on to their serfs, and these if they were better-off serfs, onto their employees.

for the fast expanding "capitalist" system of manufacture. Eventually this process (which is long and protracted and by no means so simple as we have described it) spells the ultimate demise of feudalism and the transition to capitalism as the dominant mode of social production.

The growth of the urban areas in the Middle Ages and the expansion of production and trade which this brings is in latent opposition to feudalism, but as such it is still a feudal development just as the growth of commerce and trade throughout the Roman Empire was nevertheless distinctly a Roman development. The "empirical" character of this opposition is expressed by Marx when he says, "If the country-side exploits the town politically in the Middle Ages..the town, on the other hand, exploits the land economically everywhere and without exception, through its monopoly prices, its guild organisation, its direct commercial fraudulence and its usury."¹ This opposition only becomes "theoretical" as the guildsmen become separated from their means of production, as the resulting

1. Marx, Capital Vol: 111, p.801.

exceptional increase in the production of manufactured goods begins to pose a real threat to the production of agricultural goods still under a purely feudal integument, as the feudal landlord becomes compelled to alter his productive methods and begins to throw his peasants from their land, i.e. to separate these also from their means of production. It is only once this general separation of the direct producers from the means of production has begun that it gains momentum and begins to destroy the feudal system of property. Italy in the Middle Ages is an early and somewhat isolated example of the beginnings of such a process, where, as Marx points out, exceptional urban development breaks feudalism down.¹ To this extent the city laws, the particular forms of guild regulation here are not strictly feudal.

1. cf. Dobb, Studies in the Development of Capitalism. "In Florence in 1338 there were said to be as many as 200 workshops engaged in cloth manufacture, employing a total of 30,000 workmen or about a quarter of the whole occupied population of the city; and bitter struggles were waged over the workman's right of independent organisation." - i.e. over the workman's (feudal) right to a portion of the means of production. *ibid.* p.157.
cf. also Sweezy, Transition from Feudalism to Capitalism.

Reflecting these developments on the legal side of things, Ehrlich says, "the city soon became very important, and achieved a considerable measure of independence, which in effect placed it outside the feudal constitution. The feudal constitution, in fact, has always remained a constitution of the open country. Within the walls of the city...for the first time fully developed legal institutions were expressed in a number of legal propositions: the law of real property, of pledge, of contract, of inheritance."¹ It is these particular legal developments which correspond with the economic growth of the cities and which therefore come into confrontation with status law as the "law of the land" in accordance with the general eclipse of feudalism. But so far as the separation of the direct producers from the means of production has not properly begun, in other words, so far as property is still feudal property, law is still predominantly status law and the legal developments in the cities remain merely a heterogeneous element existing insignificantly alongside it.

1. Ehrlich, Principles etc., p.34.

As feudal property relations are progressively shattered through the gradual separation of the direct producers from their means of subsistence production, so status law gradually gives way to the birth of a new legal form. And here, historically at the dawning of bourgeois society, we approach, at last, the movement from status to contract. Certainly this movement corresponds with a long and protracted historical process - but not over the whole of history. Feudal remnants are long carried over into the new era, sometimes gradually disappearing in an apparently piecemeal fashion as in England, sometimes going with an apparently "clean sweep" as in France. For this reason, we shall see in our next section, an important debate has arisen in legal sociology about the "irrationality" of English law, but which for rather different reasons passes into a debate not quite the same.

Legal Rationality

Let us locate the subject-matter of this section with a few propositions. English legal thought, according to Max Weber, displays a "degree of legal rationality (which) is essentially lower than, and of a type different from, that of continental Europe."¹ The quantitative "degree... lower than" does not, of itself, yield the qualitative "different type". Quantitative difference may or may not pass into qualitative difference; water only becomes steam at one hundred degrees centigrade. Contrary to Weber's supposition, English legal thought is not of a "different type" from that of continental Europe. On the other hand, English and continental European legal thought have their "degrees" of difference.

Continental European law (here, as throughout, we mean modern law) is very rational, says Weber, because it "received" the rational elements of

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1. Weber, Law etc., p.316.

Roman law.¹ Conversely, English law is less rational because it didn't. The truth of the matter is that the jurists on the continent historicised their law on a more rational terrain (Rome), whereas the English jurists historicised their same "bourgeois" law on feudal soil.

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1. cf. ante, on the "reception". Weber's "ideal type" of modern legal rationality in this connection is given as follows: "Present-day legal science, at least in those forms which have achieved the highest measure of methodological and logical rationality, i.e. those which have been produced through the legal science of the Pandectists' Civil Law, proceeds from the following five postulates: viz., first, that every concrete legal decision be the "application" of an abstract legal proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least be treated as if it were such a gapless system; fourth, that whatever cannot be "construed" legally in rational terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualised as either an "application" or "execution" of legal propositions, or as an "infringement" thereof." - *ibid.*, p.64. Only bourgeois law, or rather the description thereof, could possibly be so odourless, colorless and, above all, tasteless.

The real ground of Weber's arguments here is therefore the ancient as opposed to the feudal, where the abundant superiority of the noble Romans in all matters concerning the rational is indisputable. The profound truth of this is that it comes through in spite of Weber's observations: continental legal thought is "more rational".

But before we go on to look at this, there is an underhand motif which Weber slips in behind these differences of modern legal thought that deserves special mention. It is a notion not unconnected with the assumption that these differences constitute differing "types" of legal thought; it is the notion that capitalist social organisation is not "decisive" in regard of the form of law. Whereas Weber's elusive quantitative description of things enabled him to posit sameness in connection with Roman law (as we saw earlier), here it enables him in the same arbitrary manner to posit difference. Again it may be noted that to talk merely in terms of the quantitative: degree, measure, scope, extension, intension, more, less, greater, smaller etc. etc. (Weber's entire sociology is packed with this language),¹ leaves the qualitative

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1. cf. Weber's Economy and Society generally.

wide open to idle speculation - an ambiguity which Weber exploits to the full with his "value-free" prejudices. Weber never says why the less rational qualities of English law should amount to a differing form or "type" of law - and by "type" it is only rational to suppose that he means legal form (in our sense), that is, in so far as he connects it with specifically capitalist social organisation.

Briefly, Weber's position here is this. Britain and Europe (we use the term "Europe" as an abstraction of the continental European jurisdiction) are capitalist societies at roughly the same stage of development; but on account of the differing degrees of rationality in their respective systems of legal thought, "capitalism" hasn't determined the "type" of law in either case, but rather such things as the "intrinsic intellectual needs of the legal theorists"¹ have figured as the major determining element. The political psychology which belies this little example of "value-free" sociology consists in the supposition of a ghostly opponent in the shadows arguing that "capitalism" should have produced

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1. Weber, *ibid.*, p.278.

German or French legal theorists in England, or some such unfathomably mystical notion. "(T)he essential similarity of the capitalistic development on the continent, and in England," says Weber, "has not been able to eliminate the sharp contrasts between the two types of legal systems."¹ Apart from the "two types of legal systems", which we shall come to, there is a great deal which hangs on this "essential similarity of the capitalistic development". For, it is difficult to see what is "essentially similar" about the "capitalistic development" in England, which began to take root as early as the sixteenth century, and that of Germany, which was practically non-existent until the early part of the nineteenth century. Further, it is precisely for these reasons, namely, that England developed early along capitalist lines and Germany late, that England appears legally "backward" and Germany legally "advanced".

"The Germans have thought..what other nations have done,"² Marx wrote. If the German legal thinkers

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1. Weber, *ibid.*, p.318.

2. Marx, *Early Writings*, p.250. — which continues, "Germany has been their theoretical conscience. The abstraction and arrogance of Germany's thought always kept pace with the one-sided and stunted character of their reality."

cudgelled their logical and systematic brains in order to "think" the most appropriate legal expressions for the requirements of modern social development, the English achieved the same result by "doing" that which was required. The specifically capitalist expansion of production and trade does not depend on the wisdom of legal philosophers and professors of Roman law (something which Weber admits); but for this same reason, neither does the form of law depend upon the absence or presence of such wisdom (which Weber doesn't admit). The jurist does not determine the form of law, he merely articulates it - well or ill depending upon the circumstances. And in this connection Weber is quite right when he writes:

The differences between continental and common law methods of legal thought have been produced mostly by factors which are respectively connected with the internal structure and modes of existence of the legal profession as well as by factors related to differences in political development. The economic elements, however, have been determinative only in connection with these elements (they could not be otherwise -S.M.). What we are concerned with here is the fact that, once everything is said and done about these differences in historical development, modern capitalism prospers equally and manifests essentially identical economic traits under legal systems containing rules and institutions which considerably differ from each other at least from the juridical point of view.

Absolutely correct is the addition, "at least from the juridical point of view". But utterly misleading is the following further addition:

Indeed, we may say that the legal systems under which modern capitalism has been prospering differ profoundly from each other even in their ultimate principles of formal structure.

The form of law under modern capitalism contains one "ultimate principle of formal structure" which is the same in both continental and common law jurisdictions quite independently of the "juridical point of view"; it is "the" ultimate principle, namely, the principle of generalised equality, of

1. Weber, Law etc. p.315-6. The general character of Weber's argument here and throughout his entire sociology has been seen as a dialogue with Marx. "Weber and Marx" has become a rather infamous conjunction of modern sociology. Weber and "economic determinism" would be the more appropriate conjunction, for it is only by setting up such a terrific distortion of Marx, that Weber may appear on the same stage - and "win" the debate. For example, a principle of Weber's sociology in general: the economy does not "determine" religion, politics, law, thought, etc.. Everything turns here upon first giving a rude impression of the connective, of bringing it over as some kind of insensitive mechanistic relation of cause and effect. In its place, Weber makes a more "sensitive" and "subtle" connective: the "elective affinity" (a phrase artlessly and insensitively appropriated from Goethe). On the other hand, so much of modern politics, law and thought in general is so unashamedly a direct and mechanical reflex of the changing fortunes of the capitalist economy, that one hesitates in regard of the general usefulness of pointing out the errors of "economic determinism" and its erstwhile critics.

generalised right- which arises on the basis of capitalist commodity ownership. All the "juridical point of view" can do is express this ultimate principle in differing ways, more or less rationally depending upon the particular historical circumstances. We shall now consider some of these circumstances.

English legal thought is "less rational" than that of continental Europe. Theoretically this is a quantitative difference which cannot possibly pass into a qualitative difference of legal form. The legal form is a relation of capital and wage-labour, and this is so quite regardless of the varying degrees of juristic wisdom that have reflected it in different ways. Apart from this, which is no small matter, Weber has a fair appreciation of the facts. English law, or rather the common law method by which it may be characterised, proceeds "empirically" from case to case in a haphazardly casuistic manner. Historically, the monopolisation by the Inns of Court of legal training accounted for a good deal of the lack of intellectual rigour associated with keeping this mode of legal thinking alive. The resulting "craftlike specialisation of lawyers", as Weber points out, meant that any fully

comprehensive and clear treatment of the body of law as a whole was systematically prevented and that legal practice in general aimed simply, in a passive way, at adapting to a "practically useful scheme of contracts and actions, oriented towards the interests of clients in typically recurrent situations." In this kind of situation there could be little or no inducement to clear away the intellectually clumsy results and to generate concepts "by abstraction from concreteness or by logical interpretation of meaning or by generalisation and subsumption." But as Weber himself goes on to say:

Once the patterns of contracts and actions, required by the needs of interested parties, had been established with sufficient elasticity, the official law could preserve a highly archaic character and survive the greatest economic transformations without formal change.¹

Or rather, to put it a little more precisely (since the "official law" by this very fact does not really "preserve a highly archaic character"): once the bourgeois form of legality has smashed through the feudal for all practical purposes, those remaining feudal appearances "survive" in the same way that a dead man "survives" - by leaving us with a few bones and parts of his skeletal frame.

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1. Weber, Law etc., p.201-2.

But let us look a little more closely at this "archaic character" of the common law method. One of its prime "irrational" facets emphasised by Weber in contradistinction with the continental method is its system of binding precedent (*stare decisis*), whereupon past decisions of higher courts become binding upon future decisions of courts of the same and lower levels. For all appearances such a thing constitutes an irrational constraint of the past upon the present. However, the significance of this as something wholly irrational in comparison with the methods of legal decision on the continent is dubious: firstly, because it is only the "reason" (the *ratio decidendi*) of the precedent decision which is binding and secondly, because a similar, albeit far more informal, system of judicial deference to "authoritative" decisions has evolved on the continent. In fact, the "reason" or ratio of a precedent only "binds" to the extent that the jurists in question decide that it "appropriately" binds them; and whether or not such a thing is "appropriate" is greatly assisted by what is generally recognised as the "open texture" of legal decisions. Clever

jurists can gesticulate remarkably freely once they realise that it is only elastic by which their hands are tied. Apart from this, it is to be pointed out that this distinctive feature of English law is not "archaic". The strictly binding system of precedent is of very recent origin, having come into being in England gradually throughout the latter part of the eighteenth century. Hitherto, case law had figured as a mode of analogy, with no formal criteria of distinguishing its authority. Consequently, the emergence of rules proscribing the use of precedents (regardless of the crudeness of these rules, i.e. merely in regard of their - the precedents' - origin in the court hierarchy) can equally be seen as a "rational" development in English law.

Still, for all the arguments which may be used to narrow the degree of difference, there is no escaping the fact that English law is "less rational" than that of continental Europe. But not in Weber's sense of the word. Although his descriptions are factually correct, the sense in which they are construed is distorted by the leitmotif of the polemic against "economic determinism". The sense of the "less rational" is inseparable from this in Weber. Nor is "la superstition du cas", as the French jurists call it, a sufficiently rigorous

form of argument in this connection. As we have already pointed out, the "binding" character of precedent can be made effectively just as rational as "la jurisprudence", which equally recognises the authority of precedent decisions where it sees fit. However, the correctness of the "less rational" proposition does indeed concern the common law and the "empirical" character of legal thought in this connection. But this is not a self-evident truth. The absence of a civil code and the development of private law through case law does not automatically mean that it is "less rational". Moreover, it is vitally important to give such a difference as precise and specific a formulation as possible. For, as a difference of private law it becomes a difference which concerns the form of law as such.¹

The most important place to look for the precise character of the "less rational" is therefore the sphere of contract. It is here that this difference of degree can be exactly located from the properly scientific standpoint.

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1. Pt. I, ch. 3., ante.

We have said enough already elsewhere about the relations that are involved in the modern legal form of contract: the form of property in exchange, the abstract subject of the exchange act etc. They are of course supposed in the English form of contract just as much as they are on the continent. The difference, to repeat, is not and cannot be a question of legal form. The difference consists in the articulation of this form - "less rational" in the case of the English version. Let us now see what this means. The English expression of the form of contract has an irrational peculiarity which is due to the solidly empirical character of common law thinking. This peculiarity is what is known as the doctrine of consideration, and from the purely legal standpoint it is theoretically unnecessary. This is recognised implicitly on the continent where the form of contract is articulated generally in terms of the utterance alone. On the other hand, the English contract, with the doctrine of consideration, takes in a little bit of the performance. Thus, in the English contract we have not just the conception of the utterance (offer and acceptance), but along with this an irrational observation of the performance which constitutes a third element. The English

contract is: offer, acceptance and consideration. The latter is an irrational element for this reason: the only form of property necessary in the conception of the contract (from the legal standpoint) is property in exchange, i.e. property which is mutual in all respects except for the fact that in one case it is held by the buyer, and in the other by the seller. All the legal view requires therefore, is the conception of buyer and seller with equal rights, i.e. the conception of the utterance, for the exchange of property, the form of property in exchange, is implied in this alone. This we showed when we dealt earlier with the "free" contract. The idea of consideration, however, ascribes to the seller or offeror a first infinitesimal part of the the actual exchange which is given up by the offeree not strictly in exchange. Consideration need only be a peppercorn, as the common law says, whereas it doesn't even need to be this. Consideration doesn't need to exist at all, because all the elements of the "free" contract are contained in the utterance.

This above example contains a number of important points which we have made elsewhere. But the particular point which it meets here in our present concern is the nature of the "less rational" character

of the common law - it actually comes down to the difference made by a peppercorn. A theoretical difference this certainly is, since property in exchange can only be rationally considered as mutual alienation and appropriation, that is, not involving the slightest "little bit" being alienated "first" by one of the parties to the exchange act. From the rational legal standpoint, the contract is thoroughly binding in the utterance; as Hegel says, "it does not need the performance of one or the other to become so - otherwise we should have an infinite regress or infinite division of thing, labour, and time."¹ The empirical naivety of the doctrine of consideration leads theoretically to just such an infinite division. On the other hand, the continental jurists, with their rational formulation of contract, only recognise this in a negative and passive way - a fact which is proved in so far as they only sense intuitively the irrational effects of the systematisation of legal thinking on the basis of case law.

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1. Hegel, Philosophy of Mind, p.245. Hegel touches upon the essential elements of the legal form here. Being a speculative deduction, however, Hegel only gets hold of these elements from an "ideal" standpoint; but in it we observe the repulsion of the real basis (having to do with "thing, labour and time") as a rational condition of the legal form as such - which is quite remarkable.

The irrational element in the English formulation of the legal elements of contract is the most rigorous indicium possible of the "degree" of modern common law irrationality in general. This is so because it relates to the most direct (common law) legal expression of the legal form in general, i.e. the private law form of contract, and therefore strips the issue of rational legal expression right down to its essential roots. Further, we do indeed find in the English form a "less rational" legal expression of its most essential connections as a legal form, that is, in the sphere where the modern legal form in general is closest to its essential nature as a commodity-relation, namely, the private law sphere of contract. It is therefore not surprising that Weber, for example, is able to argue very powerfully in favour of the existence of a different "type" of law in this connection - for this very reason (even though he never mentions it.)

Of course, Weber is not the only writer to have overrated the differences of common law and codified systems of legal reasoning. Such a thesis is implicit as a standing part of both Anglo-American and continental-European juristic reflection. But

for this reason we have been primarily concerned with what legal sociology has to say here, i.e. because legal sociology (in Weber at least) has the merit of attempting to be scientifically explicit in its distinctions. Anglo-American jurists in general merely treat as a matter of pride "their" common law methods.¹ Juristic writers on the continent, on the other hand, are more wide-ranging and intellectualist in their approach, and testify to the rational superiority of their mode of thinking in just this way.²

We have dealt with a difference in the "rational" expression of modern legality. Theoretically it is a difference which may be ignored so far as the general character of the legal form is concerned. The same is true of such "rational" differences in general, i.e. the differences between continental-European and Anglo-American legal reason generally. Notwithstanding the superior "rationality" of German legal abstraction, for instance, the generally utilitarian character of this after the Historical School hardly becomes worthy of the name of Bentham,

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1. cf. Pollock, History etc.; Bryce, Studies in History and Jurisprudence; Holmes, The Common Law; Llewellyn, The Common Law Tradition.
2. Continental juristic writing is more "philosophical" than Anglo-American juristic writing. cf. for instance, the French writers, Fouillee, Charmont, Demogue - Modern French Philosophy, series VII.

let alone that of Kant. But this sort of terrain
we have already covered.

In Lieu of a Conclusion: A Note on Legal Continuity

Here I shall not attempt to summarise the results of the foregoing pages (as they stand they constitute summary-enough results in themselves). I shall, on the other hand, here draw attention to a theme which has figured largely throughout the whole of this work, and which would not suffer brief recapitulation.

The legal form is basically a form of articulation of generalised commodity-ownership. It is a one-sided articulation. Relations between things (commodities) become conceived as relations between persons (legally co-equal individuals), and, consequently, relations between (real) persons become effectively subsumed under the form of a relation between things. This process, amongst other things, we dealt with in part 1. But as an "articulation" of generalised commodity-ownership, the legal form exists in the way of categories, abstractions, conceptions; in a word, as something which is thought. The criticism of modern legality therefore becomes the criticism of legal thought, and most especially legal thought in its most articulate forms, in legal philosophy, legal history, legal sociology.

Now thought in general has always the aim of contemplating particular things in universal terms, of uniting the particular with the universal, and legal thought is no exception to this rule. Consequently, the most fundamental particular contemplated under the legal form, that is to say, its most basic category, the abstract subject, is contemplated in universal terms. But the mere fact that something is thought by no means implies that the object of thought has been appropriately grasped in its universal connections. Such a result is not achieved by thinking alone. Thus, when legal philosophy engages the abstract subject a priori, or when legal history and, with a more elaborate web-work of intellectual inventiveness, legal sociology posits it at the dawn of civilisation, we are by no means bound to accept this universal character so attached to it. On the contrary, as we have shown again and again, such universal connections of the abstract subject are quite erroneous and lead to all kinds of untenable notions: the "free" contract in feudal society, modern capitalism in ancient society, and so on.

The actual universal character of the abstract subject consists in its generalised character, in bourgeois society alone, whereupon "all men" become legally co-equal individuals. But the hallmark of the legal standpoint on this question is that the determinate (bourgeois) limitation upon the universality of the abstract subject is systematically overlooked. The history of modern legality as the history of an articulation of generalised commodity-ownership, as the history of an articulation of the abstract subject, is therefore the history of an error. As the commodity-relation becomes merely a relation of legally co-equal individuals, the individual or abstract subject becomes, as it were, a man for all seasons, constant as the northern star. The generalised or universal character of the abstract subject, beheld in the legal gaze, becomes stripped of its determinate socio-historical connections and is cast *sub specie aeterni*.

The history of modern legality is the history of an error. The error takes on a variety of forms, as we have shown: Kantianism, historicism, the confounding of generalised commodity-relations with commodity-relations in general, leading to such

things as the appearance of the abstract subject in Roman law, the Roman *persona juris gentium* in modern law and so on and so forth. There is no need to go over these things again here. But there is an important theme linked with the persistence and tenacity of the error here, namely, the theme of continuity.¹

The error of modern legality is its appearance as something constant, unchanging, immune from the general turmoil of historical circumstances in which it is inextricably bound up. The error is basically the conception of the abstract subject. If all else may change, this remains unchanging. If legality always finds itself compromised in one way and another due to definite and particular historical

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1. The idea of the persistence and tenacity of "the error" is one which is particularly associated with the work of the philosopher, Bachelard. Bachelard has shown in connection with various subject-matters how the process of appropriating knowledge of those subjects has been persistently hindered by obstacles of a psychic nature. cf., for instance, his "Psychoanalysis of Fire". But apart from the fact that the error of modern legality has primarily very little to do with psychic reasons, it is evident that the history of modern legality since the eclipse of classical thought at the turn of the eighteenth century, has nothing to do with the history of the scientific analysis of modern legality and that, therefore, the persistent error is not of the Bachelardian-type.

conditions, if particular laws are made, changed, abolished and so forth as a result of the most immediate demands of the moment, if all else is subject to the requirements of the times, the abstract subject remains constant. The abstract subject becomes the theme of legal continuity.

Now the theme of continuity in thought generally has recently come under attack by a number of philosophers (I use this description very loosely). Foucault, for example, warns that "we must rid ourselves of a whole mass of notions, each of which, in its own way, diversifies the theme of continuity". He goes on to say:

They (these notions) may not have a very rigorous conceptual structure, but they have a very precise function. Take the notion of tradition: it is intended to give a special temporal status to a group of phenomena that are both successive and identical (or at least similar); it makes it possible to rethink the dispersion of history in the form of the same...tradition enables us to isolate the new against a background of permanence, and to transfer its merit to originality, to genius, to the decisions proper to individuals. Then there is the notion of influence, which provides a support - of too magical a kind to be very amenable to analysis - for the facts of transmission and communication; which refers to an apparently causal process (but with neither rigorous delimitation nor theoretical definition) the phenomena of resemblance or repetition; which links, at a distance and through/

through time - as if through the mediation of a medium of propagation - such defined unities as individuals, oeuvres, notions or theories ...There is the notion of "spirit", which enables us to establish between the simultaneous or successive phenomena of a given period a community of meanings, symbolic links, an interplay of resemblance and reflection, or which allows the sovereignty of collective consciousness to emerge as the principle of unity and explanation.

This stock-in-trade, tradition, influence, spirit, has been par excellence that of legal writers.

The abstract subject has been diversified by precisely these kinds of notions. The abstract subject becomes the folk-spirit of the Historical School, the "common purposes" of the Interest School,

1. Foucault, "The Archaeology of Knowledge, p.21-2. Foucault would undoubtedly spurn the description of "philosopher", preferring perhaps the title of "archaeologist". But regardless of labels, the overwhelming feeling upon reading his books is inescapable, that his tastes, for all the tremendous denial, are philosophical. In his "Archaeology.." he says, "Only those who cannot read will be surprised that I have learned (to ask my questions) more clearly from Cuvier, Bopp, and Ricardo than from Kant or Hegel." (p.307). The question arises as to whether this little line is slipped in for the benefit of the illiterates who read his book. Since the illiterate cannot read this seems doubtful. It is there, I believe, for just the reverse category of "readers", the fastidious ones, those whom he secretly suspects as his best audience, who will appreciate his depth and make of him, in spite of everything - a philosopher. Today's philosopher, scratching out an area beneath the subtlest of modern sciences, the sciences of man.

the "socially organised purposes" of the French legal positivists, the unit of "tradition" in legal historiography (e.g. Gierke), the basis of the "influence of Bentham" in Dicey, and so on and so forth. By these routes the abstract subject becomes insulated, mummified, sealed-off from the precision of its connections with the generalised commodity-structure of bourgeois society.

While on the theme of legal continuity, it is appropriate to take note of the following idea: "It is our belief," says Poulantzas, "that it is precisely the kind of internally coherent systematisation at the basis of formal logic, a logic founded upon the independence of forms and concepts from their content, that enables the legal order to be attributed with a diachronic stability."¹ There is nothing "precise" about this at all. Formal logic is pure abstraction, and applied to legal subject-matters it establishes "diachronic stability" or continuity of form no more than it does in regard of any other subject-matter. It is not the abstraction

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1. Poulantzas, "Nature des Choses et Droit", p. 264.

of formal logic which establishes the continuity of the legal order, but the abstraction of the individual, that is, the abstract subject. It is the abstract subject which is "precisely" the theme of legal continuity. The application of formal logic to legal subject-matters figures primarily as a mode of diversifying this theme in modern legal philosophy, just as the aforementioned notions of spirit, tradition and influence diversify the theme of legal continuity in legal history, legal historiography and legal sociology. In themselves there is nothing wrong with formal logic or the ideas of tradition, influence etc. It is only (in the present case) in connection with the mystification of the abstract subject that they become distorted and one-sided. Apart from this, the application of formal logic in the "concept of law", or the "concept of a legal system",¹ or some such thing, that is to say, the abstraction of common characteristics of all legal systems, this sort of procedure least of all "enables the legal order to be attributed with a diachronic stability", for its object is least

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1. cf. Hart, "The Concept of Law" and Raz, "The Concept of a Legal System".

of all "the legal order". Formal logical procedures here abstract from "the legal order" such things as "rules", "norms" and logical types thereof in the same way that man is abstracted from Socrates, red from the rose, colour from red etc., in the course of which, "the legal order" is lost as the object of cognition. Formal logic never says what is legal about the rule in the same way that it never says what is Socratic about the man, rose-like about red, red about colour.

The element of specifically legal continuity is the abstract subject, not formal logic. Poulantzas conflates the two. The abstract subject is basically the commodity-owner under conditions of generalised commodity production. Only under these conditions does such an abstraction arise, for only here do all social relations appear the result of isolated, independent individuals freely and equally consenting to engage therein. In other words, only here is the form of all social relations dominated by the form of an exchange agreement, by the "cash nexus". Consequently, the continuity of the legal form is a relation of generalised commodity production, and to turn it into a relation of formal logic or

philosophical idealism (which Poulantzas also does) is tantamount to denying this connection.¹ Formal logic was developed by the ancients and in particular by Aristotle; so with philosophical idealism, e.g. Plato.

The continuity of the legal form is a relation of generalised commodity production, and generalised commodity production is alone capitalist production. The abstract subject, as the private owner of property in its common or exchange form equalises the owner of capital on the one side and the owner of merely the ability to work (labour-power) on the other. But at the same time it is precisely this inequality of ownership in regard of the means of production which produces over and over again the legal form of equality of owners and non-owners of these means, i.e. capital, because it is this particular relationship of inequality which forms the basis of production exclusively for exchange, of production of all things as commodities and, consequently, of all social relations as relations

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1. Similar errors are apparent in Poulantzas' later work where he attempts to make the state into something in the nature of a category of "autonomy". cf. Poulantzas, "Political Power and Social Classes."

between apparently isolated co-equal individuals. Once this relationship of inequality of ownership of the means of production is abolished therefore, so also is the abstract subject. The element of legal continuity is completely broken. For this reason it is quite absurd to think, as Karl Renner did for example, that the overthrow of capitalism would bring with it only a few minor technical adjustments in the law. Such a view flows directly from the belief that the abstract subject is historically universal and quite unconnected with capitalist production and exchange. Just the reverse is the case. And when production exclusively for exchange is replaced by production for social needs, that is, when the latter no longer has to be minimally guaranteed by an "interfering" state, then the abstract subject must inevitably disappear - whereupon "taking rights seriously" will no longer be an exercise bound by this inhuman abstraction of humanity.¹

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1. cf. Dworkin, R. Taking Rights Seriously.

BIBLIOGRAPHY

- Althusser, L. Rousseau: The Social Contract,
in Politics and History
(London 1977).
- Althusser, L. et al. Reading Capital (London
1975).
- Arendt, H. The Human Condition, A Study of the
Central Dilemmas facing Modern
Man (Chicago 1958).
- Aristotle Ethics (London 1963).

Politics (London 1888).
- Austin, J. The Province of Jurisprudence
Determined (London 1954).
- Bachelard, G. The Psychoanalysis of Fire
(London 1964).
- Binder, J. Legal Method in Private Law,
in The Jurisprudence of Interests
(Harvard, 1948).
- Blackstone, Sir. W. Commentaries on the Laws of
England (London 1857).
- Bosanquet, B. The Philosophical Theory of the
State (London 1958).
- Braverman, H. Labour and Monopoly Capital,
The Degradation of Work in
the Twentieth Century (New
York 1974).
- Bryce, J. Studies in History and Jurisprudence
2 Vols. (Oxford 1901).
- Buckland, W. Roman Law (Cambridge 1963).
- Charmont, J. Recent Phases in French Legal
Philosophy, in Modern French
Legal Philosophy (New York 1968).
- Colletti, L. From Rousseau to Lenin
(London 1976).

- Dabin, J. General Theory of Law, in Legal Philosophy of Lask, Radbruch and Dabin (Harvard 1950).
- Demogue, R. Analysis of Fundamental Notions, in Modern French Legal Philosophy (New York 1968).
- Dicey, A. Law and Public Opinion in England (London 1948).
- Dworkin, R. Taking Rights Seriously (Oxford 1977).
- D'Entreves, A. Natural Law (London 1970).
- Duguit, L. Law in the Modern State (London 1921).
- Duguit, L. Theory of Objective Law Anterior to the State, in Modern French Legal Philosophy (New York 1968).
- Dobb, M. Studies in the Development of Capitalism (London 1967).
- Durkheim, E. The Division of Labour in Society (London 1964).
- Ehrlich, E. Fundamental Principles of the Sociology of Law (Harvard 1936).
- Engels, F. Anti-Duhring (London 1975).
- Feuerbach, L. The Essence of Christianity (New York 1966).
- Finer, S. The Transmission of Benthamite Ideas 1920-50, in Studies in the Growth of 19th century Government (London 1972).
- Foucault, M. The Archaeology of Knowledge (London 1974).
- Foucault, M. The Order of Things, An Archaeology of the Human Sciences (London 1974).

- Fouillee, A. Synthesis of Idealism and Naturalism, in Modern French Legal Philosophy (New York 1968).
- Freud, S. The Interpretation of Dreams (Harmondsworth 1976).
- Friedrich, C. The Philosophy of Law in Historical Perspective (Chicago 1963).
- Fuller, L. The Morality of Law (New Haven 1969).
- Gaius Institutes, (Oxford 1958).
- Giddens, A. Capitalism and Modern Social Theory (Cambridge 1971).
- Gierke, O. Natural Law and the Theory of Society 1500-1800 (Boston 1950).
- Gurvitch, G. Sociology of Law (London 1947).
- Habermas, J. Theory and Practice (London 1974).
- Hart, H. The Concept of Law (Oxford 1961).
- Heck, P. The Jurisprudence of Interests, in collection of the same title (Harvard 1948).
- Hegel, G. Logic (Oxford 1874).
- Hegel, G. Philosophy of Right (Oxford 1973).
- Hegel, G. Philosophy of Mind (Oxford 1973).
- Halevy, E. The Growth of Philosophic Radicalism (London 1928).
- Hirsch, J. The State Apparatus and Social Reproduction: Elements of a Theory of the Bourgeois State, in The State and Capital: A Marxist Debate (London 1978 - forthcoming).

- | | |
|------------------------------|---|
| Hirst, P. and
Hindess, B. | Pre-Capitalist Modes of
Production (London 1976). |
| Holdsworth, Sir W. | A History of English Law
(London 1965). |
| Hobbes, T. | Leviathan (London 1962). |
| Holmes, O. | The Common Law (Boston 1945). |
| Hume, D. | An Inquiry Concerning Human
Understanding (Chicago 1912). |
| Jhering, R. | Law as a Means to an End
(New Jersey 1968). |
| Justinian | Institutes (Oxford 1955). |
| Kant, I. | Critique of Pure Reason
(New York 1899). |
| Kant, I. | Metaphysic of Ethics
(Edinburgh 1886). |
| Kant, I. | Philosophy of Law
(Edinburgh 1887). |
| Kelsen, H. | Pure Theory of Law (Berkeley
1970). |
| Lec, G. | Historical Jurisprudence
(London 1900). |
| Lenin, V. | Materialism and Empirio-
Criticism, Critical Comments
on a Reactionary Philosophy
(Moscow 1970). |
| Llewellyn, K. | The Common Law Tradition
(Boston 1969). |
| Locke, J. | Two Treatises on Government
(London 1970). |
| Lukacs, G. | The Young Hegel, Studies in the
Relations between Dialectics and
Economics (London 1975). |
| Maitland, F. | Selected Essays (Cambridge 1936). |

- Maitland, F. The Forms of Action at Common Law (Cambridge 1936).
- Maine, Sir. H. Ancient Law, its connection with the Early History of Society and its relation to Modern Ideas (London 1909).
- Mandel, E. (ed.) The Struggle Against Fascism in Germany, Trotsky on (Harmondsworth 1975).
- Mann, F. The Legal Aspect of Money, with special reference to Comparative Private and Public International Law (Oxford 1953).
- Marx, K. Capital, 3 Vols. (London 1974).
- Marx, K. Grundrisse (Harmondsworth 1973).
- Marx, K. Early Writings (Harmondsworth 1975).
- Marx, K. and Engels, F. Selected Works, 1 Vol. (London 1970).
- Milson, S. The Legal Structure of Feudalism (Oxford 1977).
- More, Sir T. Utopia (Harmondsworth 1967).
- Niebuhr, R. Beyond Tragedy (London 1938).
- Nietzsche, F. Beyond Good and Evil (Edinburgh 1900/Harmondsworth 1975).
- Nietzsche, F. Twilight of the Idols/Anti-Christ (Harmondsworth 1977).
- Pascal, B. Thoughts (London 1899).
- Pashukanis, E. The General Theory of Law and Marxism, in Soviet Legal Theory (Harvard 1951)/Allgemeine Rechtslehre und Marxismus (Berlin 1951).
- Pashukanis, E. The Soviet State and the Revolution in Law, in Soviet Legal Theory (Harvard 1951).

- | | |
|-------------------------------------|--|
| Plato | Protagoras, in Protagoras and Meno (Harmondsworth 1964). |
| Plucknett, T. | Concise History of the Common Law (London 1956). |
| Plutarch | Of the Fortune or Virtue of Alexander, in Morals Vol. 1 (London 1870). |
| Pollock, Sir F.
and Maitland, F. | History of English Law, 2 vols. (Cambridge 1968). |
| Poulantzas, N. | Nature des Choses et Droit, Essai sur la Dialectique du Fait et de la Valeur (Paris 1965). |
| Poulantzas, N. | Political Power and Social Classes (London 1973). |
| Popper, K. | The Poverty of Historicism (London 1960). |
| Puchta, G. | Outlines of Jurisprudence as the Science of Right, in Outlines of the Science of Jurisprudence (Edinburgh 1887). |
| Radbruch, G. | Legal Philosophy, in The Legal Philosophies of Lask, Radbruch and Dabin (Harvard 1950). |
| Rawls, J. | A Theory of Justice (Oxford 1973). |
| Raz, J. | The Concept of a Legal System (Oxford 1970). |
| Renner, K. | The Institutions of Private Law and their Social Function (London 1976)/ Die Rechtsinstitute des Privatrechts und ihre Soziale Function (Tubingen 1929). |
| Rousseau, J. | The Social Contract (London 1955). |
| Rousseau J. | Discourses (London 1955). |

